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ONTARIO LABOUR RELATIONS BOARD REPORTS

May/June 1997



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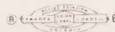
A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1997] OLRB REP. MAY/JUNE

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario



CASES REPORTED

1. Alcan Aluminium Limited; Re Millwright Local 1410 ("Millwrights"); Re Alcan Chemicals, Division of Alcan Aluminium Limited ("Chemical"); Alcan Rolled Products ("Rolled Products"); Alcan Cable ("Cable"); Alcan Foil Products ("Foil"); USWA, Local 7949 and Local 8754 ("Steelworkers"); IAM, Lodge 54 ("Machinists").....	305
2. Bellwoods Centre for Community Living Inc.; Re SEIU, Local 204.....	331
3. Black Photo Corporation; Union of Needletrades, Industrial and Textile Employees Ontario District Council; Re Group of Employees.....	347
4. Canadian Imperial Bank of Commerce, North American Trust Company, Allstate Insurance Company of Canada, Charles R. McDonald, William Pascoe, Clifford N. Sutts, Aric J. Rusk and BDO Dunwoody Limited, Davis Martindale and Company Inc., Coopers & Lybrand Limited; Re CAW-Canada.....	371
5. Corporation of The City of St. Thomas, The; Re Canadian Health Care Workers; Re London & District Service Workers' Union, Local 220.....	373
6. Doug Chalmers Construction Limited; Re LIUNA, Local 1089; Re CJA, Local 1256.....	385
7. Dover Corporation (Canada) Limited, Industrial Division; Re National Automobile, Transportation and General Workers Union of Canada (CAW-Canada).....	396
8. Fort William Clinic; Re SEU Local 268 Affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C.	406
9. Hill's Greenhouses Ltd.; Re Susan Wolframe, Carole Fawcett and Ethel Kemp.....	442
10. Hilton Canada Inc. and Sizzling in Toronto Inc.; Re HERE, Local 75.....	452
11. Ingersoll Plastics Inc.; Re David Pentland; Re LIUNA, Local 1059 Affiliated with A.F. of L. - C.I.O. - C.L.C., O.F.L.	463
12. Marriott Corporation of Canada Ltd. (at Carleton University); Re CUPE and its Local 2451.....	468
13. Metro Cab Company Limited and Metro Cabs Associates' Committee Representing Associates of Metro Cab Company Limited; Re Retail Wholesale Canada, Canadian Service Sector Division of the USWA and Local 1688 The Ontario Taxi Union.....	474
14. Metro Toronto Civic Employees' Union, Local 43; Re CUPE; Re Darius Masalas, Harro Bauer, Woodrow A. Higgins, Danny Scheibli, Brian Morgan, Thomas Lenathen and Earl Gordon	478
15. Mining Technologies International Inc.; Re USWA.....	482
16. Perth and Smith Falls District Hospital; Re OPSEU, CUPE and its Local 2119, Association of Allied Health Professionals: Ontario, Independent Canadian Transit Union and its Local 6; Re Non-Union Employees, Perth and Smiths Falls District Hospital	491
17. Pet-Pak Containers, 95467 Ontario Ltd. c.o.b. as; Re CUOE.....	520
18. Pietro Electric Limited; Re IBEW Construction Council of Ontario, and IBEW Local 773.....	527
19. Toronto Board of Education; Re Selwyn Pieters; Re CUPE, Local 134.....	541
20. White Rose Crafts and Nursery Sales Limited; Re UFCW, Local 1977.....	554

COURT PROCEEDINGS

1. Canadian Wildlife Federation; Re Jan Bureau and Vicki Page, on their own behalf and on behalf of a Group of Employees of The Canadian Wildlife Federation, USWA, Local 8327, OLRB	555
2. Demetriades, John; Re OLRB and St. Joseph's Health Centre	556
3. International Brotherhood of Electrical Workers, Ken Woods, Allan Diggon, Tom McGreevy and IBEW, Local 1788 by its Trustee, IBEW and Ontario Hydro and EPSCA and IBEW Electrical Power Systems Construction Council of Ontario, OLRB; Re Power Workers' Union - CUPE, Local 1000 and J. Caskanette, G.D. Chaffey, M.D. Collins, L. Crausen, H.R. Gillies, R.C. Hansen, G. O'Donnell, J. Stark, R. Thoms, H. Tomsett and R.R. Young on their own behalf and on behalf of all members of The IBEW, Local 1788	557

SUBJECT INDEX

- Bargaining Rights - Collective Agreement - Sale of a Business - Union making sale of a business application and alleging that "MTI" is a successor to "E" - Board ruling that collective agreement relied on by union to establish broader bargaining rights was made in contravention of the Act and, therefore, may not be relied on - Collective agreement relied on by union involving early termination of earlier collective agreement without consent of the Board or, alternatively, amendment of collective agreement extending its term of operation - Neither result permitted under the Act - Board concluding that scope of union's bargaining rights did not include location in Elora, Ontario - Application dismissed
- MINING TECHNOLOGIES INTERNATIONAL INC.; RE USWA..... 482
- Bargaining Unit - Certification - Construction Industry - Practice and Procedure - Millwrights' union and Plumbers' union seeking to represent certain construction employees of multi-plant employer - Steelworkers' union and Machinists' union already representing certain employees of employer in certain locations, including employees doing certain construction work - Board describing appropriate bargaining units in certification applications as excluding construction employees already represented by Steelworkers' union and Machinists' union - Employer submitting that Plumbers' union should be estopped from applying for certification because of union's alleged misrepresentation to employer regarding the union's intentions to obtain bargaining rights - Employer's allegations dismissed for failure to make out prima facie case
- ALCAN ALUMINIUM LIMITED; RE MILLWRIGHT LOCAL 1410 ("MILLWRIGHTS"); RE ALCAN CHEMICALS, DIVISION OF ALCAN ALUMINIUM LIMITED ("CHEMICAL"); ALCAN ROLLED PRODUCTS ("ROLLED PRODUCTS"); ALCAN CABLE ("CABLE"); ALCAN FOIL PRODUCTS ("FOIL"); USWA, LOCAL 7949 AND LOCAL 8754 ("STEELWORKERS"); IAM, LODGE 54 ("MACHINISTS")..... 305
- Bargaining Units - Combination of Bargaining Units - Employer applying under Bill 7 transitional provisions to "de-combine" bargaining unit of full-time and part-time employees - Board finding that Bill 7's reference to "community of interest" is meant to invoke Board's traditional approach to the concept and not its more modern version as expressed in *Hospital for Sick Children* case - Board applying traditional approach and finding that existing bargaining unit not appropriate
- MARRIOTT CORPORATION OF CANADA LTD. (AT CARLETON UNIVERSITY); RE CUPE AND ITS LOCAL 2451 468
- Build-Up - Certification - 52 of 86 ballots counted in representation vote cast in favour of union representation - Employer asking Board to apply build-up principle and to hold new vote 8 weeks later when number of actual employment positions will have increased by 53% - Board accepting union's calculation of potential build-up as no more than 41% - Board seeing no reason to order second vote - Certificate issuing
- PET-PAK CONTAINERS, 95467 ONTARIO LTD. C.O.B. AS; RE CUOE..... 520
- Certification - Bargaining Unit - Construction Industry - Practice and Procedure - Millwrights' union and Plumbers' union seeking to represent certain construction employees of multi-plant employer - Steelworkers' union and Machinists' union already representing certain employees of employer in certain locations, including employees doing certain construction work - Board describing appropriate bargaining units in certification applications as excluding construction employees already represented by Steelworkers' union and Machinists' union - Employer submitting that Plumbers' union should be estopped from applying for certification because of

union's alleged misrepresentation to employer regarding the union's intentions to obtain bargaining rights - Employer's allegations dismissed for failure to make out prima facie case

ALCAN ALUMINIUM LIMITED; RE MILLWRIGHT LOCAL 1410 ("MILLWRIGHTS");
RE ALCAN CHEMICALS, DIVISION OF ALCAN ALUMINIUM LIMITED ("CHEMI-
CAL"); ALCAN ROLLED PRODUCTS ("ROLLED PRODUCTS"); ALCAN CABLE
("CABLE"); ALCAN FOIL PRODUCTS ("FOIL"); USWA, LOCAL 7949 AND LOCAL 8754
("STEELWORKERS"); IAM, LODGE 54 ("MACHINISTS").....

305

Certification - Build-Up - 52 of 86 ballots counted in representation vote cast in favour of union representation - Employer asking Board to apply build-up principle and to hold new vote 8 weeks later when number of actual employment positions will have increased by 53% - Board accepting union's calculation of potential build-up as no more than 41% - Board seeing no reason to order second vote - Certificate issuing

PET-PAK CONTAINERS, 95467 ONTARIO LTD. C.O.B. AS; RE CUOE.....

520

Certification - Certification Where Act Contravened - Construction Industry - Discharge - Discharge for Union Activity - Remedies - Unfair Labour Practice - Board finding that employer violated the Act when it discharged union's two key supporters - Board finding membership support adequate for collective bargaining where union had signed up 2 employees out of 10 in bargaining unit and where union applying for ICI bargaining rights - Board finding that other requirements under section 11(1) also satisfied - Certificates issuing - Board also directing reinstatement and compensation for infringement of statutory rights, even if offer of reinstatement declined and even if the discharged employees were otherwise employed through entire period - Board also declaring that union entitled to conduct two meetings with employees during working hours, in the absence of the employer

PIETRO ELECTRIC LIMITED; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO,
AND IBEW LOCAL 773

527

Certification - Employee - Evidence - Membership Evidence - Reconsideration - Representation Vote - Trade Union Status - Board finding that locals of UNITE and UNITE's Ontario District Council are inter-related organizations each of which has status of a trade union within the meaning of the Act - Employer and objecting employees asking Board to dismiss application on grounds that application filed by District Council was accompanied by evidence of membership in International union - Board seeing no reason to overturn evidence of earlier finding regarding 40 percent "appearance" of support in applicant - Board allowing union to challenge employment status of two individuals for first time after the vote where their status was already in issue for other reasons and their ballots were already segregated

BLACK PHOTO CORPORATION; UNION OF NEEDLETRADES, INDUSTRIAL AND
TEXTILE EMPLOYEES ONTARIO DISTRICT COUNCIL; RE GROUP OF EMPLOYEES .

347

Certification - Hospital Labour Disputes Arbitration Act - Timeliness - Canadian Health Care Workers seeking to displace London & District Service Workers Union, Local 220 as bargaining agent for certain employees - Most recent collective agreement between employer and incumbent union expired in 1992 - Board of Arbitration issuing award covering January 1, 1993 to December 31, 1994 period in January 1997 - Award dated November 1996 - Award remitting lay-off issue to parties for further negotiation and Board of Arbitration remaining seized - Whether certification application timely under provisions of HLDAA - Board finding that award not deciding matters in dispute and that 90 day extension under subsection 10(12) of HLDAA not yet triggered - Certification application dismissed as premature and untimely

CORPORATION OF THE CITY OF ST. THOMAS, THE; RE CANADIAN HEALTH CARE
WORKERS; RE LONDON & DISTRICT SERVICE WORKERS' UNION, LOCAL 220

373

Certification - Representation Vote - Local of UFCW applying for certification - Employer asking for application to be dismissed without a hearing or a vote on ground that one-year bar in effect

against UFCW as result of unsuccessful application made by it three months earlier - Employer asserting that UFCW and its local "one and the same" for purposes of the Act - In the alternative, employer asking for ruling on bar issue prior to directing vote - Board directing vote and noting that bar issue may be raised subsequently

WHITE ROSE CRAFTS AND NURSERY SALES LIMITED; RE UFCW, LOCAL 1977..... 554

Certification Where Act Contravened - Certification - Construction Industry - Discharge - Discharge for Union Activity - Remedies - Unfair Labour Practice - Board finding that employer violated the Act when it discharged union's two key supporters - Board finding membership support adequate for collective bargaining where union had signed up 2 employees out of 10 in bargaining unit and where union applying for ICI bargaining rights - Board finding that other requirements under section 11(1) also satisfied - Certificates issuing - Board also directing reinstatement and compensation for infringement of statutory rights, even if offer of reinstatement declined and even if the discharged employees were otherwise employed through entire period - Board also declaring that union entitled to conduct two meetings with employees during working hours, in the absence of the employer

PIETRO ELECTRIC LIMITED; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO, AND IBEW LOCAL 773 527

Change in Working Conditions - First Contract Arbitration - Intimidation and Coercion - Interference in Trade Unions - Termination - Unfair Labour Practice - Board finding breach of statutory freeze in respect of failure to pay Christmas bonus, but not in respect of failure to hold annual Christmas party - Board finding employer's letter to employees coercive and designed to undermine union's bargaining authority, and that employer otherwise seeking to interfere with exercise of employees' rights by intimidation and coercion - Board finding that collective bargaining unsuccessful because of refusal of employer to recognize union's bargaining authority, because of uncompromising nature of employer's bargaining positions without justification, and because of failure to make reasonable and expeditious efforts to conclude a collective agreement - Board directing that first agreement be settled by arbitration and that pending termination application be dismissed

FORT WILLIAM CLINIC; RE SEU LOCAL 268 AFFILIATED WITH THE S.E.I.U., A.F. OF L., C.I.O. AND C.L.C. 406

Collective Agreement - Bargaining Rights - Sale of a Business - Union making sale of a business application and alleging that "MTI" is a successor to "E" - Board ruling that collective agreement relied on by union to establish broader bargaining rights was made in contravention of the Act and, therefore, may not be relied on - Collective agreement relied on by union involving early termination of earlier collective agreement without consent of the Board or, alternatively, amendment of collective agreement extending its term of operation - Neither result permitted under the Act - Board concluding that scope of union's bargaining rights did not include location in Elora, Ontario - Application dismissed

MINING TECHNOLOGIES INTERNATIONAL INC.; RE USWA..... 482

Collective Agreement - Construction Industry - Judicial Review - Ratification and Strike Vote - Memorandum of settlement between union and employer in construction industry made contingent on ratification - Union submitting agreement to union's accredited delegates and not to employees in the bargaining unit - Board dismissing complaint alleging that provisions of section 79 of the Act requiring employee ratification in these circumstances - Application for judicial review dismissed by Divisional Court as premature

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, KEN WOODS, ALLAN DIGGON, TOM MCGREEVY AND IBEW, LOCAL 1788 BY ITS TRUSTEE, IBEW AND ONTARIO HYDRO AND EPSCA AND IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO, OLRB; RE POWER WORKERS' UNION - CUPE, LOCAL 1000 AND J. CASKANETTE, G.D. CHAFFEY, M.D. COLLINS, L. CRAUSEN, H.R. GILLIES, R.C. HANSEN, G. O'DONNELL, J. STARK, R. THOMS, H. TOMSETT AND R.R. YOUNG ON THEIR OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE IBEW, LOCAL 1788..... 557

Collective Agreement - Judicial Review - Parties - Termination - Timeliness - Board dismissing application to terminate bargaining rights after finding that document executed between union and employer was "collective agreement" - Application not brought during last two months of collective agreement and, therefore, untimely - Employer applying for judicial review - Divisional Court holding that employer without status to seek review of Board's decision - Judicial review application dismissed

CANADIAN WILDLIFE FEDERATION; RE JAN BUREAU AND VICKI PAGE, ON THEIR OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES OF THE CANADIAN WILDLIFE FEDERATION, USWA, LOCAL 8327, OLRB

555

Construction Industry - Bargaining Unit - Certification - Practice and Procedure - Millwrights' union and Plumbers' union seeking to represent certain construction employees of multi-plant employer - Steelworkers' union and Machinists' union already representing certain employees of employer in certain locations, including employees doing certain construction work - Board describing appropriate bargaining units in certification applications as excluding construction employees already represented by Steelworkers' union and Machinists' union - Employer submitting that Plumbers' union should be estopped from applying for certification because of union's alleged misrepresentation to employer regarding the union's intentions to obtain bargaining rights - Employer's allegations dismissed for failure to make out prima facie case

ALCAN ALUMINIUM LIMITED; RE MILLWRIGHT LOCAL 1410 ("MILLWRIGHTS"); RE ALCAN CHEMICALS, DIVISION OF ALCAN ALUMINIUM LIMITED ("CHEMICAL"); ALCAN ROLLED PRODUCTS ("ROLLED PRODUCTS"); ALCAN CABLE ("CABLE"); ALCAN FOIL PRODUCTS ("FOIL"); USWA, LOCAL 7949 AND LOCAL 8754 ("STEELWORKERS"); IAM, LODGE 54 ("MACHINISTS").....

305

Construction Industry - Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Remedies - Unfair Labour Practice - Board finding that employer violated the Act when it discharged union's two key supporters - Board finding membership support adequate for collective bargaining where union had signed up 2 employees out of 10 in bargaining unit and where union applying for ICI bargaining rights - Board finding that other requirements under section 11(1) also satisfied - Certificates issuing - Board also directing reinstatement and compensation for infringement of statutory rights, even if offer of reinstatement declined and even if the discharged employees were otherwise employed through entire period - Board also declaring that union entitled to conduct two meetings with employees during working hours, in the absence of the employer

PIETRO ELECTRIC LIMITED; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO, AND IBEW LOCAL 773

527

Construction Industry - Collective Agreement - Judicial Review - Ratification and Strike Vote - Memorandum of settlement between union and employer in construction industry made contingent on ratification - Union submitting agreement to union's accredited delegates and not to employees in the bargaining unit - Board dismissing complaint alleging that provisions of section 79 of the Act requiring employee ratification in these circumstances - Application for judicial review dismissed by Divisional Court as premature

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, KEN WOODS, ALLAN DIGGON, TOM MCGREEVY AND IBEW, LOCAL 1788 BY ITS TRUSTEE, IBEW AND ONTARIO HYDRO AND EPSCA AND IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO, OLRB; RE POWER WORKERS' UNION - CUPE, LOCAL 1000 AND J. CASKANETTE, G.D. CHAFFEY, M.D. COLLINS, L. CRAUSEN, H.R. GILLIES, R.C. HANSEN, G. O'DONNELL, J. STARK, R. THOMS, H. TOMSETT AND R.R. YOUNG ON THEIR OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE IBEW, LOCAL 1788.....

557

Construction Industry - Jurisdictional Dispute - Labourers' union and Carpenters' union disputing assignment of work of tending carpenters working on scaffolding and supervision of such work - Board satisfied that Labourers have tending (of carpenters engaged in scaffolding work) work jurisdiction in the relevant geographic area - Board requiring assignment of at least one construction labourer to tend carpenters on all five scaffolding jobs in issue and permitting employer to add additional labourers to tend carpenters as it considers appropriate - Board making no order with respect to supervision of work in dispute	
DOUG CHALMERS CONSTRUCTION LIMITED; RE LIUNA, LOCAL 1089; RE CJA, LOCAL 1256	385
Combination of Bargaining Units - Bargaining Units - Employer applying under Bill 7 transitional provisions to "de-combine" bargaining unit of full-time and part-time employees - Board finding that Bill 7's reference to "community of interest" is meant to invoke Board's traditional approach to the concept and not its more modern version as expressed in <i>Hospital for Sick Children</i> case - Board applying traditional approach and finding that existing bargaining unit not appropriate	
MARRIOTT CORPORATION OF CANADA LTD. (AT CARLETON UNIVERSITY); RE CUPE AND ITS LOCAL 2451	468
Discharge - Certification - Certification Where Act Contravened - Construction Industry - Discharge for Union Activity - Remedies - Unfair Labour Practice - Board finding that employer violated the Act when it discharged union's two key supporters - Board finding membership support adequate for collective bargaining where union had signed up 2 employees out of 10 in bargaining unit and where union applying for ICI bargaining rights - Board finding that other requirements under section 11(1) also satisfied - Certificates issuing - Board also directing reinstatement and compensation for infringement of statutory rights, even if offer of reinstatement declined and even if the discharged employees were otherwise employed through entire period - Board also declaring that union entitled to conduct two meetings with employees during working hours, in the absence of the employer	
PIETRO ELECTRIC LIMITED; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO, AND IBEW LOCAL 773	527
Discharge - Discharge for Union Activity - Judicial Review - Reconsideration - Unfair Labour Practice - Board exercising its discretion not to inquire into unfair labour practice complaint where substance of complaint and of grievances at arbitration overlapped, where allegation of anti-union motivation was before arbitration board and where arbitration board had complete jurisdiction to inquire into matter - Complaint dismissed - Request for reconsideration dismissed - Application for judicial review dismissed by Divisional Court	
DEMETRIADES, JOHN; RE OLRB AND ST. JOSEPH'S HEALTH CENTRE	556
Discharge - First Contract Arbitration - Strike - Unfair Labour Practice - Board's earlier direction that first contract be settled by arbitration ending strike - Union and employer disputing return to work obligations - Board making various preliminary rulings at parties' request - Board not accepting union's argument that section 43(14)(b) gives senior employees the right to be returned to any work that they are able to do, even if it is not the same work that they were performing before the strike started - Board finding that section 43(14) applies to require employer to reinstate all employees by seniority, regardless of whether or not they were working at the time the first contract direction was issued - Board rejecting union's argument that section 43(14) provides a guarantee against discharge of striking employees in the event of a first contract direction - Board also finding no statutory basis for requiring employer to justify terminations on either just cause or cause standard per se	
DOVER CORPORATION (CANADA) LIMITED, INDUSTRIAL DIVISION; RE NATIONAL AUTOMOBILE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)	396

Discharge for Union Activity - Certification - Certification Where Act Contravened - Construction Industry - Discharge - Remedies - Unfair Labour Practice - Board finding that employer violated the Act when it discharged union's two key supporters - Board finding membership support adequate for collective bargaining where union had signed up 2 employees out of 10 in bargaining unit and where union applying for ICI bargaining rights - Board finding that other requirements under section 11(1) also satisfied - Certificates issuing - Board also directing reinstatement and compensation for infringement of statutory rights, even if offer of reinstatement declined and even if the discharged employees were otherwise employed through entire period - Board also declaring that union entitled to conduct two meetings with employees during working hours, in the absence of the employer	
PIETRO ELECTRIC LIMITED; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO, AND IBEW LOCAL 773	527
Discharge for Union Activity - Discharge - Judicial Review - Reconsideration - Unfair Labour Practice - Board exercising its discretion not to inquire into unfair labour practice complaint where substance of complaint and of grievances at arbitration overlapped, where allegation of anti-union motivation was before arbitration board and where arbitration board had complete jurisdiction to inquire into matter - Complaint dismissed - Request for reconsideration dismissed - Application for judicial review dismissed by Divisional Court	
DEMETRIADES, JOHN; RE OLRB AND ST. JOSEPH'S HEALTH CENTRE.....	556
Duty to Bargain in Good Faith - Interim Relief - Remedies - Unfair Labour Practice - Union alleging that employer's failure to provide certain financial and other information violating duty to bargain - Board making interim order under section 98 of the Act directing production of information and setting out mechanism for its collection	
METRO CAB COMPANY LIMITED AND METRO CABS ASSOCIATES' COMMITTEE REPRESENTING ASSOCIATES OF METRO CAB COMPANY LIMITED; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE USWA AND LOCAL 1688 THE ONTARIO TAXI UNION.....	474
Employee - Certification - Evidence - Membership Evidence - Reconsideration - Representation Vote - Trade Union Status - Board finding that locals of UNITE and UNITE's Ontario District Council are inter-related organizations each of which has status of a trade union within the meaning of the Act - Employer and objecting employees asking Board to dismiss application on grounds that application filed by District Council was accompanied by evidence of membership in International union - Board seeing no reason to overturn evidence of earlier finding regarding 40 percent "appearance" of support in applicant - Board allowing union to challenge employment status of two individuals for first time after the vote where their status was already in issue for other reasons and their ballots were already segregated	
BLACK PHOTO CORPORATION; UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES ONTARIO DISTRICT COUNCIL; RE GROUP OF EMPLOYEES .	347
Evidence - Certification - Employee - Membership Evidence - Reconsideration - Representation Vote - Trade Union Status - Board finding that locals of UNITE and UNITE's Ontario District Council are inter-related organizations each of which has status of a trade union within the meaning of the Act - Employer and objecting employees asking Board to dismiss application on grounds that application filed by District Council was accompanied by evidence of membership in International union - Board seeing no reason to overturn evidence of earlier finding regarding 40 percent "appearance" of support in applicant - Board allowing union to challenge employment status of two individuals for first time after the vote where their status was already in issue for other reasons and their ballots were already segregated	
BLACK PHOTO CORPORATION; UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES ONTARIO DISTRICT COUNCIL; RE GROUP OF EMPLOYEES .	347

Evidence - Health and Safety - Practice and Procedure - Board permitting applicant's representative to tape record proceedings subject to certain specific restrictions regarding use of the recording - Applicant employee alleging that he was harassed and discriminated against by his employer on the basis of his race and that he suffered reprisals for having exercised rights under the Occupational Health and Safety Act ("OHSA") - Board declining to hear proffered "factual" and opinion evidence to establish that racial harassment and discrimination may constitute a hazard under OHSA and that the Ontario Human Rights Commission ("OHRC") is failing to exercise its jurisdiction under the Human Rights Code - Board declining to inquire into application because application in essence a complaint about race discrimination and because that matter should be dealt with by OHRC - Application dismissed	
TORONTO BOARD OF EDUCATION; RE SELWYN PIETERS; RE CUPE, LOCAL 134	541
First Contract Arbitration - Change in Working Conditions - Intimidation and Coercion - Interference in Trade Unions - Termination - Unfair Labour Practice - Board finding breach of statutory freeze in respect of failure to pay Christmas bonus, but not in respect of failure to hold annual Christmas party - Board finding employer's letter to employees coercive and designed to undermine union's bargaining authority, and that employer otherwise seeking to interfere with exercise of employees' rights by intimidation and coercion - Board finding that collective bargaining unsuccessful because of refusal of employer to recognize union's bargaining authority, because of uncompromising nature of employer's bargaining positions without justification, and because of failure to make reasonable and expeditious efforts to conclude a collective agreement - Board directing that first agreement be settled by arbitration and that pending termination application be dismissed	
FORT WILLIAM CLINIC; RE SEU LOCAL 268 AFFILIATED WITH THE S.E.I.U., A.F. OF L., C.I.O. AND C.L.C.	406
First Contract Arbitration - Discharge - Strike - Unfair Labour Practice - Board's earlier direction that first contract be settled by arbitration ending strike - Union and employer disputing return to work obligations - Board making various preliminary rulings at parties' request - Board not accepting union's argument that section 43(14)(b) gives senior employees the right to be returned to any work that they are able to do, even if it is not the same work that they were performing before the strike started - Board finding that section 43(14) applies to require employer to reinstate all employees by seniority, regardless of whether or not they were working at the time the first contract direction was issued - Board rejecting union's argument that section 43(14) provides a guarantee against discharge of striking employees in the event of a first contract direction - Board also finding no statutory basis for requiring employer to justify terminations on either just cause or cause standard per se	
DOVER CORPORATION (CANADA) LIMITED, INDUSTRIAL DIVISION; RE NATIONAL AUTOMOBILE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)	396
First Contract Arbitration - Practice and Procedure - Representation Vote - Termination - Parties agreeing to adjourn first contract application sine die before any hearing - Five months later, union asking for application to be listed for hearing - Employees filing termination application one month after union's request and three weeks before first contract application scheduled to be heard - Board not ordering representation vote and deferring consideration of termination application until first contract application decided	
INGERSOLL PLASTICS INC.; RE DAVID PENTLAND; RE LIUNA, LOCAL 1059 AFFILIATED WITH A.F. OF L. - C.I.O. - C.L.C., O.F.L.	463
Health and Safety - Evidence - Practice and Procedure - Board permitting applicant's representative to tape record proceedings subject to certain specific restrictions regarding use of the recording - Applicant employee alleging that he was harassed and discriminated against by his employer on the basis of his race and that he suffered reprisals for having exercised rights under the	

Occupational Health and Safety Act ("OHS") - Board declining to hear proffered "factual" and opinion evidence to establish that racial harassment and discrimination may constitute a hazard under OHS and that the Ontario Human Rights Commission ("OHRC") is failing to exercise its jurisdiction under the Human Rights Code - Board declining to inquire into application because application in essence a complaint about race discrimination and because that matter should be dealt with by OHRC - Application dismissed

TORONTO BOARD OF EDUCATION; RE SELWYN PIETERS; RE CUPE, LOCAL 134 541

Hospital Labour Disputes Arbitration Act - Certification - Timeliness - Canadian Health Care Workers seeking to displace London & District Service Workers Union, Local 220 as bargaining agent for certain employees - Most recent collective agreement between employer and incumbent union expired in 1992 - Board of Arbitration issuing award covering January 1, 1993 to December 31, 1994 period in January 1997 - Award dated November 1996 - Award remitting lay-off issue to parties for further negotiation and Board of Arbitration remaining seized - Whether certification application timely under provisions of HLDAA - Board finding that award not deciding matters in dispute and that 90 day extension under subsection 10(12) of HLDAA not yet triggered - Certification application dismissed as premature and untimely

CORPORATION OF THE CITY OF ST. THOMAS, THE; RE CANADIAN HEALTH CARE WORKERS; RE LONDON & DISTRICT SERVICE WORKERS' UNION, LOCAL 220 373

Hospital Labour Disputes Arbitration Act - Reference - Board not accepting submission that Board ought not to answer question posed in Minister's reference on grounds of res judicata or issue estoppel or abuse of process - Employer providing "independent living" services to physically disabled adults living in three housing projects - Employer also offering outreach services to clients living in their own homes - Board finding employer to be a "hospital" within meaning of Hospital Labour Disputes Arbitration Act

BELLWOODS CENTRE FOR COMMUNITY LIVING INC.; RE SEIU, LOCAL 204 331

Interim Relief - Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - Union alleging that employer's failure to provide certain financial and other information violating duty to bargain - Board making interim order under section 98 of the Act directing production of information and setting out mechanism for its collection

METRO CAB COMPANY LIMITED AND METRO CABS ASSOCIATES' COMMITTEE REPRESENTING ASSOCIATES OF METRO CAB COMPANY LIMITED; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE USWA AND LOCAL 1688 THE ONTARIO TAXI UNION 474

Interference in Trade Unions - Change in Working Conditions - First Contract Arbitration - Intimidation and Coercion - Termination - Unfair Labour Practice - Board finding breach of statutory freeze in respect of failure to pay Christmas bonus, but not in respect of failure to hold annual Christmas party - Board finding employer's letter to employees coercive and designed to undermine union's bargaining authority, and that employer otherwise seeking to interfere with exercise of employees' rights by intimidation and coercion - Board finding that collective bargaining unsuccessful because of refusal of employer to recognize union's bargaining authority, because of uncompromising nature of employer's bargaining positions without justification, and because of failure to make reasonable and expeditious efforts to conclude a collective agreement - Board directing that first agreement be settled by arbitration and that pending termination application be dismissed

FORT WILLIAM CLINIC; RE SEU LOCAL 268 AFFILIATED WITH THE S.E.I.U., A.F. OF L., C.I.O. AND C.L.C. 406

Interference in Trade Unions - Unfair Labour Practice - Union asserting that employer deducted dues totalling \$35,000 from employees which were never remitted to union - Employer placed in receivership and later declaring bankruptcy - Union filing unfair labour practice complaint

against various receivers and secured creditors of employer and claiming that they have interfered in administration of union by failing to remit dues already deducted from employees - Board not satisfied that respondents fairly characterized as “persons acting on behalf of employer” - Board also concluding that unremitted dues amounting to “claim provable in bankruptcy” within meaning of Bankruptcy and Insolvency Act (BIA), and that union’s application barred by section 69.3 of BIA - Union’s unfair labour practice complaint dismissed

CANADIAN IMPERIAL BANK OF COMMERCE, NORTH AMERICAN TRUST COMPANY, ALLSTATE INSURANCE COMPANY OF CANADA, CHARLES R. MCDONALD, WILLIAM PASCOE, CLIFFORD N. SUTTS, ARIC J. RUSK AND BDO DUNWOODY LIMITED, DAVIS MARTINDALE AND COMPANY INC., COOPERS & LYBRAND LIMITED; RE CAW-CANADA.....

371

Intimidation and Coercion - Change in Working Conditions - First Contract Arbitration - Interference in Trade Unions - Termination - Unfair Labour Practice - Board finding breach of statutory freeze in respect of failure to pay Christmas bonus, but not in respect of failure to hold annual Christmas party - Board finding employer’s letter to employees coercive and designed to undermine union’s bargaining authority, and that employer otherwise seeking to interfere with exercise of employees’ rights by intimidation and coercion - Board finding that collective bargaining unsuccessful because of refusal of employer to recognize union’s bargaining authority, because of uncompromising nature of employer’s bargaining positions without justification, and because of failure to make reasonable and expeditious efforts to conclude a collective agreement - Board directing that first agreement be settled by arbitration and that pending termination application be dismissed

FORT WILLIAM CLINIC; RE SEU LOCAL 268 AFFILIATED WITH THE S.E.I.U., A.F. OF L., C.I.O. AND C.L.C.

406

Judicial Review - Collective Agreement - Construction Industry - Ratification and Strike Vote - Memorandum of settlement between union and employer in construction industry made contingent on ratification - Union submitting agreement to union’s accredited delegates and not to employees in the bargaining unit - Board dismissing complaint alleging that provisions of section 79 of the Act requiring employee ratification in these circumstances - Application for judicial review dismissed by Divisional Court as premature

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, KEN WOODS, ALLAN DIGGON, TOM MCGREEVY AND IBEW, LOCAL 1788 BY ITS TRUSTEE, IBEW AND ONTARIO HYDRO AND EPSCA AND IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO, OLRB; RE POWER WORKERS’ UNION - CUPE, LOCAL 1000 AND J. CASKANETTE, G.D. CHAFFEY, M.D. COLLINS, L. CRAUSEN, H.R. GILLIES, R.C. HANSEN, G. O’DONNELL, J. STARK, R. THOMS, H. TOMSETT AND R.R. YOUNG ON THEIR OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE IBEW, LOCAL 1788.....

557

Judicial Review - Collective Agreement - Parties - Termination - Timeliness - Board dismissing application to terminate bargaining rights after finding that document executed between union and employer was “collective agreement” - Application not brought during last two months of collective agreement and, therefore, untimely - Employer applying for judicial review - Divisional Court holding that employer without status to seek review of Board’s decision - Judicial review application dismissed

CANADIAN WILDLIFE FEDERATION; RE JAN BUREAU AND VICKI PAGE, ON THEIR OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES OF THE CANADIAN WILDLIFE FEDERATION, USWA, LOCAL 8327, OLRB

555

Judicial Review - Discharge - Discharge for Union Activity - Reconsideration - Unfair Labour Practice - Board exercising its discretion not to inquire into unfair labour practice complaint where substance of complaint and of grievances at arbitration overlapped, where allegation of

anti-union motivation was before arbitration board and where arbitration board had complete jurisdiction to inquire into matter - Complaint dismissed - Request for reconsideration dismissed - Application for judicial review dismissed by Divisional Court

DEMETRIADES, JOHN; RE OLRB AND ST. JOSEPH'S HEALTH CENTRE..... 556

Jurisdictional Dispute - Construction Industry - Labourers' union and Carpenters' union disputing assignment of work of tending carpenters working on scaffolding and supervision of such work - Board satisfied that Labourers have tending (of carpenters engaged in scaffolding work) work jurisdiction in the relevant geographic area - Board requiring assignment of at least one construction labourer to tend carpenters on all five scaffolding jobs in issue and permitting employer to add additional labourers to tend carpenters as it considers appropriate - Board making no order with respect to supervision of work in dispute

DOUG CHALMERS CONSTRUCTION LIMITED; RE LIUNA, LOCAL 1089; RE CJA, LOCAL 1256..... 385

Membership Evidence - Certification - Employee - Evidence - Reconsideration - Representation Vote - Trade Union Status - Board finding that locals of UNITE and UNITE's Ontario District Council are inter-related organizations each of which has status of a trade union within the meaning of the Act - Employer and objecting employees asking Board to dismiss application on grounds that application filed by District Council was accompanied by evidence of membership in International union - Board seeing no reason to overturn evidence of earlier finding regarding 40 percent "appearance" of support in applicant - Board allowing union to challenge employment status of two individuals for first time after the vote where their status was already in issue for other reasons and their ballots were already segregated

BLACK PHOTO CORPORATION; UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES ONTARIO DISTRICT COUNCIL; RE GROUP OF EMPLOYEES . 347

Parties - Collective Agreement - Judicial Review - Termination - Timeliness - Board dismissing application to terminate bargaining rights after finding that document executed between union and employer was "collective agreement" - Application not brought during last two months of collective agreement and, therefore, untimely - Employer applying for judicial review - Divisional Court holding that employer without status to seek review of Board's decision - Judicial review application dismissed

CANADIAN WILDLIFE FEDERATION; RE JAN BUREAU AND VICKI PAGE, ON THEIR OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES OF THE CANADIAN WILDLIFE FEDERATION, USWA, LOCAL 8327, OLRB 555

Practice and Procedure - Bargaining Unit - Certification - Construction Industry - Millwrights' union and Plumbers' union seeking to represent certain construction employees of multi-plant employer - Steelworkers' union and Machinists' union already representing certain employees of employer in certain locations, including employees doing certain construction work - Board describing appropriate bargaining units in certification applications as excluding construction employees already represented by Steelworkers' union and Machinists' union - Employer submitting that Plumbers' union should be estopped from applying for certification because of union's alleged misrepresentation to employer regarding the union's intentions to obtain bargaining rights - Employer's allegations dismissed for failure to make out prima facie case

ALCAN ALUMINIUM LIMITED; RE MILLWRIGHT LOCAL 1410 ("MILLWRIGHTS"); RE ALCAN CHEMICALS, DIVISION OF ALCAN ALUMINIUM LIMITED ("CHEMICAL"); ALCAN ROLLED PRODUCTS ("ROLLED PRODUCTS"); ALCAN CABLE ("CABLE"); ALCAN FOIL PRODUCTS ("FOIL"); USWA, LOCAL 7949 AND LOCAL 8754 ("STEELWORKERS"); IAM, LODGE 54 ("MACHINISTS")..... 305

Practice and Procedure - Evidence - Health and Safety - Board permitting applicant's representative to tape record proceedings subject to certain specific restrictions regarding use of the recording -

Applicant employee alleging that he was harassed and discriminated against by his employer on the basis of his race and that he suffered reprisals for having exercised rights under the Occupational Health and Safety Act ("OHSA") - Board declining to hear proffered "factual" and opinion evidence to establish that racial harassment and discrimination may constitute a hazard under OHSA and that the Ontario Human Rights Commission ("OHRC") is failing to exercise its jurisdiction under the Human Rights Code - Board declining to inquire into application because application in essence a complaint about race discrimination and because that matter should be dealt with by OHRC - Application dismissed

TORONTO BOARD OF EDUCATION; RE SELWYN PIETERS; RE CUPE, LOCAL 134 541

Practice and Procedure - First Contract Arbitration - Representation Vote - Termination - Parties agreeing to adjourn first contract application sine die before any hearing - Five months later, union asking for application to be listed for hearing - Employees filing termination application one month after union's request and three weeks before first contract application scheduled to be heard - Board not ordering representation vote and deferring consideration of termination application until first contract application decided

INGERSOLL PLASTICS INC.; RE DAVID PENTLAND; RE LIUNA, LOCAL 1059 AFFILIATED WITH A.F. OF L. - C.I.O. - C.L.C., O.F.L..... 463

Ratification and Strike Vote - Collective Agreement - Construction Industry - Judicial Review - Memorandum of settlement between union and employer in construction industry made contingent on ratification - Union submitting agreement to union's accredited delegates and not to employees in the bargaining unit - Board dismissing complaint alleging that provisions of section 79 of the Act requiring employee ratification in these circumstances - Application for judicial review dismissed by Divisional Court as premature

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, KEN WOODS, ALLAN DIGGON, TOM MCGREEVY AND IBEW, LOCAL 1788 BY ITS TRUSTEE, IBEW AND ONTARIO HYDRO AND EPSCA AND IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO, OLRB; RE POWER WORKERS' UNION - CUPE, LOCAL 1000 AND J. CASKANETTE, G.D. CHAFFEY, M.D. COLLINS, L. CRAUSEN, H.R. GILLIES, R.C. HANSEN, G. O'DONNELL, J. STARK, R. THOMS, H. TOMSETT AND R.R. YOUNG ON THEIR OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE IBEW, LOCAL 1788..... 557

Reconsideration - Certification - Employee - Evidence - Membership Evidence - Representation Vote - Trade Union Status - Board finding that locals of UNITE and UNITE's Ontario District Council are inter-related organizations each of which has status of a trade union within the meaning of the Act - Employer and objecting employees asking Board to dismiss application on grounds that application filed by District Council was accompanied by evidence of membership in International union - Board seeing no reason to overturn evidence of earlier finding regarding 40 percent "appearance" of support in applicant - Board allowing union to challenge employment status of two individuals for first time after the vote where their status was already in issue for other reasons and their ballots were already segregated

BLACK PHOTO CORPORATION; UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES ONTARIO DISTRICT COUNCIL; RE GROUP OF EMPLOYEES . 347

Reconsideration - Discharge - Discharge for Union Activity - Judicial Review - Unfair Labour Practice - Board exercising its discretion not to inquire into unfair labour practice complaint where substance of complaint and of grievances at arbitration overlapped, where allegation of anti-union motivation was before arbitration board and where arbitration board had complete jurisdiction to inquire into matter - Complaint dismissed - Request for reconsideration dismissed - Application for judicial review dismissed by Divisional Court

DEMETRIADES, JOHN; RE OLRB AND ST. JOSEPH'S HEALTH CENTRE..... 556

Reference - Hospital Labour Disputes Arbitration Act - Board not accepting submission that Board ought not to answer question posed in Minister's reference on grounds of res judicata or issue estoppel or abuse of process - Employer providing "independent living" services to physically disabled adults living in three housing projects - Employer also offering outreach services to clients living in their own homes - Board finding employer to be a "hospital" within meaning of Hospital Labour Disputes Arbitration Act	
BELLWOODS CENTRE FOR COMMUNITY LIVING INC.; RE SEIU, LOCAL 204	331
Remedies - Duty to Bargain in Good Faith - Interim Relief - Unfair Labour Practice - Union alleging that employer's failure to provide certain financial and other information violating duty to bargain - Board making interim order under section 98 of the Act directing production of information and setting out mechanism for its collection	
METRO CAB COMPANY LIMITED AND METRO CABS ASSOCIATES' COMMITTEE REPRESENTING ASSOCIATES OF METRO CAB COMPANY LIMITED; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE USWA AND LOCAL 1688 THE ONTARIO TAXI UNION	474
Remedies - Sale of a Business - Representation Vote - Board earlier finding merger of two hospitals to be sale of a business - Board subsequently finding intermingling and determining that combined service/office/clerical unit and paramedical units appropriate - Board directing taking of representation votes and determining that all incumbent unions should be listed on ballot and that, because vast majority of employees in bargaining units unionized, there ought not to be non-union option on ballot	
PERTH AND SMITH FALLS DISTRICT HOSPITAL; RE OPSEU, CUPE AND ITS LOCAL 2119, ASSOCIATION OF ALLIED HEALTH PROFESSIONALS: ONTARIO, INDEPENDENT CANADIAN TRANSIT UNION AND ITS LOCAL 6; RE NON-UNION EMPLOYEES, PERTH AND SMITHS FALLS DISTRICT HOSPITAL.....	491
Representation Vote - Certification - Local of UFCW applying for certification - Employer asking for application to be dismissed without a hearing or a vote on ground that one-year bar in effect against UFCW as result of unsuccessful application made by it three months earlier - Employer asserting that UFCW and its local "one and the same" for purposes of the Act - In the alternative, employer asking for ruling on bar issue prior to directing vote - Board directing vote and noting that bar issue may be raised subsequently	
WHITE ROSE CRAFTS AND NURSERY SALES LIMITED; RE UFCW, LOCAL 1977	554
Representation Vote - Certification - Employee - Evidence - Membership Evidence - Reconsideration - Trade Union Status - Board finding that locals of UNITE and UNITE's Ontario District Council are inter-related organizations each of which has status of a trade union within the meaning of the Act - Employer and objecting employees asking Board to dismiss application on grounds that application filed by District Council was accompanied by evidence of membership in International union - Board seeing no reason to overturn evidence of earlier finding regarding 40 percent "appearance" of support in applicant - Board allowing union to challenge employment status of two individuals for first time after the vote where their status was already in issue for other reasons and their ballots were already segregated	
BLACK PHOTO CORPORATION; UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES ONTARIO DISTRICT COUNCIL; RE GROUP OF EMPLOYEES .	347
Representation Vote - First Contract Arbitration - Practice and Procedure - Termination - Parties agreeing to adjourn first contract application sine die before any hearing - Five months later, union asking for application to be listed for hearing - Employees filing termination application one month after union's request and three weeks before first contract application scheduled to	

be heard - Board not ordering representation vote and deferring consideration of termination application until first contract application decided	
INGERSOLL PLASTICS INC.; RE DAVID PENTLAND; RE LIUNA, LOCAL 1059 AFFILIATED WITH A.F. OF L. - C.I.O. - C.L.C., O.F.L.....	463
Representation Vote - Sale of a Business - Remedies - Board earlier finding merger of two hospitals to be sale of a business - Board subsequently finding intermingling and determining that combined service/office/clerical unit and paramedical units appropriate - Board directing taking of representation votes and determining that all incumbent unions should be listed on ballot and that, because vast majority of employees in bargaining units unionized, there ought not to be non-union option on ballot	
PERTH AND SMITH FALLS DISTRICT HOSPITAL; RE OPSEU, CUPE AND ITS LOCAL 2119, ASSOCIATION OF ALLIED HEALTH PROFESSIONALS: ONTARIO, INDEPENDENT CANADIAN TRANSIT UNION AND ITS LOCAL 6; RE NON-UNION EMPLOYEES, PERTH AND SMITHS FALLS DISTRICT HOSPITAL.....	491
Sale of a Business - Board dismissing application for successor rights resulting from closing of restaurant in Toronto hotel and subsequent opening of steakhouse in same premises	
HILTON CANADA INC. AND SIZZLING IN TORONTO INC.; RE HERE, LOCAL 75.....	452
Sale of a Business - Bargaining Rights - Collective Agreement - Union making sale of a business application and alleging that "MTI" is a successor to "E" - Board ruling that collective agreement relied on by union to establish broader bargaining rights was made in contravention of the Act and, therefore, may not be relied on - Collective agreement relied on by union involving early termination of earlier collective agreement without consent of the Board or, alternatively, amendment of collective agreement extending its term of operation - Neither result permitted under the Act - Board concluding that scope of union's bargaining rights did not include location in Elora, Ontario - Application dismissed	
MINING TECHNOLOGIES INTERNATIONAL INC.; RE USWA.....	482
Sale of a Business - Remedies - Representation Vote - Board earlier finding merger of two hospitals to be sale of a business - Board subsequently finding intermingling and determining that combined service/office/clerical unit and paramedical units appropriate - Board directing taking of representation votes and determining that all incumbent unions should be listed on ballot and that, because vast majority of employees in bargaining units unionized, there ought not to be non-union option on ballot	
PERTH AND SMITH FALLS DISTRICT HOSPITAL; RE OPSEU, CUPE AND ITS LOCAL 2119, ASSOCIATION OF ALLIED HEALTH PROFESSIONALS: ONTARIO, INDEPENDENT CANADIAN TRANSIT UNION AND ITS LOCAL 6; RE NON-UNION EMPLOYEES, PERTH AND SMITHS FALLS DISTRICT HOSPITAL.....	491
Strike - Discharge - First Contract Arbitration - Unfair Labour Practice - Board's earlier direction that first contract be settled by arbitration ending strike - Union and employer disputing return to work obligations - Board making various preliminary rulings at parties' request - Board not accepting union's argument that section 43(14)(b) gives senior employees the right to be returned to any work that they are able to do, even if it is not the same work that they were performing before the strike started - Board finding that section 43(14) applies to require employer to reinstate all employees by seniority, regardless of whether or not they were working at the time the first contract direction was issued - Board rejecting union's argument that section 43(14) provides a guarantee against discharge of striking employees in the event of a first contract direction - Board also finding no statutory basis for requiring employer to justify terminations on either just cause or cause standard per se	
DOVER CORPORATION (CANADA) LIMITED, INDUSTRIAL DIVISION; RE NATIONAL AUTOMOBILE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)	396

Termination - Change in Working Conditions - First Contract Arbitration - Intimidation and Coercion - Interference in Trade Unions - Unfair Labour Practice - Board finding breach of statutory freeze in respect of failure to pay Christmas bonus, but not in respect of failure to hold annual Christmas party - Board finding employer's letter to employees coercive and designed to undermine union's bargaining authority, and that employer otherwise seeking to interfere with exercise of employees' rights by intimidation and coercion - Board finding that collective bargaining unsuccessful because of refusal of employer to recognize union's bargaining authority, because of uncompromising nature of employer's bargaining positions without justification, and because of failure to make reasonable and expeditious efforts to conclude a collective agreement - Board directing that first agreement be settled by arbitration and that pending termination application be dismissed	
FORT WILLIAM CLINIC; RE SEU LOCAL 268 AFFILIATED WITH THE S.E.I.U., A.F. OF L., C.I.O. AND C.L.C.	406
Termination - Collective Agreement - Judicial Review - Parties - Timeliness - Board dismissing application to terminate bargaining rights after finding that document executed between union and employer was "collective agreement" - Application not brought during last two months of collective agreement and, therefore, untimely - Employer applying for judicial review - Divisional Court holding that employer without status to seek review of Board's decision - Judicial review application dismissed	
CANADIAN WILDLIFE FEDERATION; RE JAN BUREAU AND VICKI PAGE, ON THEIR OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES OF THE CANADIAN WILDLIFE FEDERATION, USWA, LOCAL 8327, OLRB	555
Termination - First Contract Arbitration - Practice and Procedure - Representation Vote - Parties agreeing to adjourn first contract application sine die before any hearing - Five months later, union asking for application to be listed for hearing - Employees filing termination application one month after union's request and three weeks before first contract application scheduled to be heard - Board not ordering representation vote and deferring consideration of termination application until first contract application decided	
INGERSOLL PLASTICS INC.; RE DAVID PENTLAND; RE LIUNA, LOCAL 1059 AFFILIATED WITH A.F. OF L. - C.I.O. - C.L.C., O.F.L.	463
Timeliness - Certification - Hospital Labour Disputes Arbitration Act - Canadian Health Care Workers seeking to displace London & District Service Workers Union, Local 220 as bargaining agent for certain employees - Most recent collective agreement between employer and incumbent union expired in 1992 - Board of Arbitration issuing award covering January 1, 1993 to December 31, 1994 period in January 1997 - Award dated November 1996 - Award remitting lay-off issue to parties for further negotiation and Board of Arbitration remaining seized - Whether certification application timely under provisions of HLDAA - Board finding that award not deciding matters in dispute and that 90 day extension under subsection 10(12) of HLDAA not yet triggered - Certification application dismissed as premature and untimely	
CORPORATION OF THE CITY OF ST. THOMAS, THE; RE CANADIAN HEALTH CARE WORKERS; RE LONDON & DISTRICT SERVICE WORKERS' UNION, LOCAL 220	373
Timeliness - Collective Agreement - Judicial Review - Parties - Termination - Board dismissing application to terminate bargaining rights after finding that document executed between union and employer was "collective agreement" - Application not brought during last two months of collective agreement and, therefore, untimely - Employer applying for judicial review - Divisional Court holding that employer without status to seek review of Board's decision - Judicial review application dismissed	
CANADIAN WILDLIFE FEDERATION; RE JAN BUREAU AND VICKI PAGE, ON THEIR OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES OF THE CANADIAN WILDLIFE FEDERATION, USWA, LOCAL 8327, OLRB	555

Trade Union Status - Certification - Employee - Evidence - Membership Evidence - Reconsideration - Representation Vote - Board finding that locals of UNITE and UNITE's Ontario District Council are inter-related organizations each of which has status of a trade union within the meaning of the Act - Employer and objecting employees asking Board to dismiss application on grounds that application filed by District Council was accompanied by evidence of membership in International union - Board seeing no reason to overturn evidence of earlier finding regarding 40 percent "appearance" of support in applicant - Board allowing union to challenge employment status of two individuals for first time after the vote where their status was already in issue for other reasons and their ballots were already segregated	
BLACK PHOTO CORPORATION; UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES ONTARIO DISTRICT COUNCIL; RE GROUP OF EMPLOYEES .	347
Trusteeship - Board consenting to six-month continuation of trusteeship by CUPE over CUPE Local 43	
METRO TORONTO CIVIC EMPLOYEES' UNION, LOCAL 43; RE CUPE; RE DARIUS MASALAS, HARRO BAUER, WOODROW A. HIGGINS, DANNY SCHEIBLI, BRIAN MORGAN, THOMAS LENATHEN AND EARL GORDON.....	478
Unfair Labour Practice - Union alleging that employer committing various unfair labour practices - Employer asserting that employees employed in horticulture and, therefore, that Labour Relations Act not applying - Board finding employees employed in silviculture and therefore covered by the Act	
HILL'S GREENHOUSES LTD.; RE SUSAN WOLFRAME, CAROLE FAWCETT AND ETHEL KEMP	442
Unfair Labour Practice - Certification - Certification Where Act Contravened - Construction Industry - Discharge - Discharge for Union Activity - Remedies - Board finding that employer violated the Act when it discharged union's two key supporters - Board finding membership support adequate for collective bargaining where union had signed up 2 employees out of 10 in bargaining unit and where union applying for ICI bargaining rights - Board finding that other requirements under section 11(1) also satisfied - Certificates issuing - Board also directing reinstatement and compensation for infringement of statutory rights, even if offer of reinstatement declined and even if the discharged employees were otherwise employed through entire period - Board also declaring that union entitled to conduct two meetings with employees during working hours, in the absence of the employer	
PIETRO ELECTRIC LIMITED; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO, AND IBEW LOCAL 773	527
Unfair Labour Practice - Change in Working Conditions - First Contract Arbitration - Intimidation and Coercion - Interference in Trade Unions - Termination - Board finding breach of statutory freeze in respect of failure to pay Christmas bonus, but not in respect of failure to hold annual Christmas party - Board finding employer's letter to employees coercive and designed to undermine union's bargaining authority, and that employer otherwise seeking to interfere with exercise of employees' rights by intimidation and coercion - Board finding that collective bargaining unsuccessful because of refusal of employer to recognize union's bargaining authority, because of uncompromising nature of employer's bargaining positions without justification, and because of failure to make reasonable and expeditious efforts to conclude a collective agreement - Board directing that first agreement be settled by arbitration and that pending termination application be dismissed	
FORT WILLIAM CLINIC; RE SEU LOCAL 268 AFFILIATED WITH THE S.E.I.U., A.F. OF L., C.I.O. AND C.L.C.	406
Unfair Labour Practice - Discharge - Discharge for Union Activity - Judicial Review - Reconsideration - Board exercising its discretion not to inquire into unfair labour practice complaint where	

substance of complaint and of grievances at arbitration overlapped, where allegation of anti-union motivation was before arbitration board and where arbitration board had complete jurisdiction to inquire into matter - Complaint dismissed - Request for reconsideration dismissed - Application for judicial review dismissed by Divisional Court

DEMETRIADES, JOHN; RE OLRB AND ST. JOSEPH'S HEALTH CENTRE..... 556

Unfair Labour Practice - Discharge - First Contract Arbitration - Strike - Board's earlier direction that first contract be settled by arbitration ending strike - Union and employer disputing return to work obligations - Board making various preliminary rulings at parties' request - Board not accepting union's argument that section 43(14)(b) gives senior employees the right to be returned to any work that they are able to do, even if it is not the same work that they were performing before the strike started - Board finding that section 43(14) applies to require employer to reinstate all employees by seniority, regardless of whether or not they were working at the time the first contract direction was issued - Board rejecting union's argument that section 43(14) provides a guarantee against discharge of striking employees in the event of a first contract direction - Board also finding no statutory basis for requiring employer to justify terminations on either just cause or cause standard per se

DOVER CORPORATION (CANADA) LIMITED, INDUSTRIAL DIVISION; RE NATIONAL AUTOMOBILE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) 396

Unfair Labour Practice - Duty to Bargain in Good Faith - Interim Relief - Remedies - Union alleging that employer's failure to provide certain financial and other information violating duty to bargain - Board making interim order under section 98 of the Act directing production of information and setting out mechanism for its collection

METRO CAB COMPANY LIMITED AND METRO CABS ASSOCIATES' COMMITTEE REPRESENTING ASSOCIATES OF METRO CAB COMPANY LIMITED; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE USWA AND LOCAL 1688 THE ONTARIO TAXI UNION..... 474

Unfair Labour Practice - Interference in Trade Unions - Union asserting that employer deducted dues totalling \$35,000 from employees which were never remitted to union - Employer placed in receivership and later declaring bankruptcy - Union filing unfair labour practice complaint against various receivers and secured creditors of employer and claiming that they have interfered in administration of union by failing to remit dues already deducted from employees - Board not satisfied that respondents fairly characterized as "persons acting on behalf of employer" - Board also concluding that unremitted dues amounting to "claim provable in bankruptcy" within meaning of Bankruptcy and Insolvency Act (BIA), and that union's application barred by section 69.3 of BIA - Union's unfair labour practice complaint dismissed

CANADIAN IMPERIAL BANK OF COMMERCE, NORTH AMERICAN TRUST COMPANY, ALLSTATE INSURANCE COMPANY OF CANADA, CHARLES R. MCDONALD, WILLIAM PASCOE, CLIFFORD N. SUTTS, ARIC J. RUSK AND BDO DUNWOODY LIMITED, DAVIS MARTINDALE AND COMPANY INC., COOPERS & LYBRAND LIMITED; RE CAW-CANADA..... 371

2736-96-R; 2743-96-R Millwright Local 1410 (“Millwrights”), Applicant v. **Alcan Aluminium Limited**, Responding Party v. Alcan Chemicals, Division of Alcan Aluminium Limited (“Chemicals”); Alcan Rolled Products (“Rolled Products”); Alcan Cable (“Cable”); Alcan Foil Products (“Foil”); United Steelworkers of America, Local 7949 and Local 8754 (“Steelworkers”); International Association of Machinists and Aerospace Workers, Lodge 54 (“Machinists”), Intervenor; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 221 (“U.A.”), Applicant v. Alcan Aluminium Limited, Responding Party v. Alcan Chemicals, Division of Alcan Aluminium Limited (“Chemicals”); Alcan Rolled Products (“Rolled Products”); Alcan Cable (“Cable”); Alcan Foil Products (“Foil”); United Steelworkers of America, Local 7949 and Local 8754 (“Steelworkers”); International Association of Machinists and Aerospace Workers, Lodge 54 (“Machinists”), Intervenor

Bargaining Unit - Certification - Construction Industry - Practice and Procedure - Millwrights’ union and Plumbers’ union seeking to represent certain construction employees of multi-plant employer - Steelworkers’ union and Machinists’ union already representing certain employees of employer in certain locations, including employees doing certain construction work - Board describing appropriate bargaining units in certification applications as excluding construction employees already represented by Steelworkers’ union and Machinists’ union - Employer submitting that Plumbers’ union should be estopped from applying for certification because of union’s alleged misrepresentation to employer regarding the union’s intentions to obtain bargaining rights - Employer’s allegations dismissed for failure to make out prima facie case

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *A.M. Minsky* for Ontario Pipe Trades Council, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 221; *Denis Ellickson* for Millwright District Council of Ontario and its Local 1410; *Paul A. Boniferro* for Chemicals; *Marie Kelly* for United Steelworkers of America, Local 7949 and Local 8754; *Bob Wright* for Cable, Rolled Products and Foil; *James L. Shields* for the International Association of Machinists and Aerospace Workers, Lodge 54.

DECISION OF THE BOARD; June 9, 1997

I

Introduction

1. By decision dated March 10, 1997, the Board held that “Alcan Aluminium Limited” is the responding employer in these applications for certification.

2. I wish to note that I should have distinguished between these two applications when I suggested in that earlier decision that certificates would inevitably issue in each of them (see paragraph 5 of the March 10, 1997 decision). That is the case in the Millwright application in Board File No. 2736-96-R. However, whether or not certificates will issue in the U.A.’s application in Board File No. 2743-96-R depends upon the disposition of the allegations made against the U.A., and specifically against U.A. Local 221, which are referenced in paragraph 54 of the March 10, 1997 decision.

3. A further hearing was convened on March 17, 1997. At that hearing, the issue of the identity of the applicant in each case was resolved and the Board heard the representations of the parties with respect to what can be broadly referred to as the “bargaining unit description” issue. I reserved my decision on that issue.

4. On March 18, 1997, I heard the representations of Mr. Boniferro and Mr. Minsky with respect to Mr. Minsky’s motion that the allegations made against U.A. Local 221 in Board File No. 2743-96-R be dismissed without a hearing. I reserved on that issue as well.

II

Clarifying the Identity of the Applicants

5. Without objection from any other party, Millwrights Local 1410 was stipulated to be the applicant in Board File No. 2736-96-R, and U.A. Local 221 was stipulated to be the applicant in Board File No. 2743-96-R. The name of the applicant in each application is therefor amended accordingly.

III

Representation of the Responding Employer

6. I find it worth noting that notwithstanding the Board’s determination that Alcan Aluminium Limited is the responding employer in these applications, and not “Alcan Chemicals, Division of Alcan Aluminium Limited”, the same four divisions of Alcan Aluminium Limited as before, including Chemicals, appeared through counsel at the hearing on March 17, 1997. No one identified him or herself as specifically appearing on behalf of Alcan Aluminium Limited. U.A. Local 221, supported by Millwright Local 1410, objected to this. They submitted that since the only responding employer in each case is Alcan Aluminium Limited, that was the only employer entity which continued to have standing in the proceedings, and that none of the four divisions had any business being there any longer. The applicants also expressed their concern that Alcan Aluminium Limited should only have “one voice” in the remainder of the proceedings.

7. Mr. Boniferro confirmed that he continued to represent Chemicals. Mr. Wright confirmed that he continued to act for the other three Alcan divisions: Rolled Products, Foil and Cable. Neither of them said that they appeared on behalf of Alcan Aluminium Limited. However, Mr. Boniferro did say that the “voices of the divisions collectively is the voice of Alcan Aluminium Limited”, that Alcan Aluminium Limited was represented by its four divisions, and that no one who is a party to the proceedings was unrepresented.

8. It seems to me that this development merely confirms the correctness of the Board’s March 10, 1997 decision that Alcan Aluminium Limited is the proper responding employer. Despite the avowed separateness of Chemicals and the other three divisions from Alcan Aluminium Limited and each other, these divisions were united in their representation of Alcan Aluminium Limited and its interests. In fairness to Rolled Products, Cable and Foil, they could at least assert that they had their own interests to protect, and were in a position to assert Alcan Aluminium Limited’s interests with respect to the bargaining unit description issue. On the other hand, it is difficult to see any separation between the interests of these three divisions and Alcan Aluminium Limited in that respect, which again suggests that they are not as separate, for labour relations purposes at least, as they suggest. Since there are no existing bargaining rights at either of Chemicals’ locations in Ontario, its position in that respect was much more tenuous, and if it was truly a separate labour relations entity, it would be in no position to address the issue raised by the interventions of the Steelworkers and the Machinists. In any case, the proper employer party in both applications is Alcan Aluminium Limited (hereinafter “Alcan”) and none

of the Alcan divisions was entitled to participate in the continuation of these proceedings as such; that is, as the separate labour relations entities they continued to profess to be.

9. Generally, this would result in the only identified employer entity in the proceedings being Alcan, and while that single employer entity could have as many co-counsel as it wished, it could only speak with “one voice”. On the other hand, an employer like Alcan can choose to be represented by or through whomever it wishes. If it chooses to be represented by or through one or more of its divisions, that is up to it, so long as this does not interfere with the conduct of the proceedings. In this particular instance, the conduct of counsel for the divisions was beyond reproach. They did not repeat each other, or seek to duplicate what the other did. The hearing in the first phase of these proceedings had proceeded expeditiously and had been completed within the time scheduled for it. There was nothing to suggest that counsel would not continue to act appropriately in that respect. Further, as a practical matter, the evidence which was likely to be called, or the submissions which would be made would not be altered by attempting to give effect to the applicant’s objection to the continued presence of the divisions as such. If witnesses had been required (as they turned out not to be), the same ones would undoubtedly have been called, and the same representations would undoubtedly have been made, probably by the same two counsel, albeit speaking with “one voice”. Indeed, the only likely real delay which was likely to be occasioned would have been that required by the (short) adjournment which would have been necessary to give Mr. Boniferro and Mr. Wright an opportunity to seek the appropriate instructions.

10. Accordingly, in the exercise of the Board’s discretion as the master of its own procedure, and bringing to bear what I hoped was some common sense to the situation, I ruled that I would permit the four Alcan divisions, through their respective counsel, to speak for Alcan. However, I did caution counsel that if it began to appear that this was creating some difficulties in the proceedings, I would be prepared to re-visit the issue.

11. As it turned out, it was unnecessary to do so. The parties were able to reach agreement on all facts which they considered appropriate for the Board to have before it, and their submissions on the bargaining unit description issue were concise and to the point. Further, in U.A. Local 221’s motion to dismiss the allegations against it, only Chemicals, again representing Alcan’s interests, and U.A. Local 221 participated, and that motion was also dealt with expeditiously by counsel.

IV

The Bargaining Unit Description Issue

12. I turn first to what I have characterized as the “bargaining unit description” issue, which includes the alternative position adopted by the Alcan divisions in the first phase of these proceedings and upon which I had reserved my decision (see paragraph 52 of the March 10, 1997 decision herein).

(a) Facts

13. The facts before me in that respect are those in evidence from the first phase, and the facts agreed to at the March 17, 1997 hearing as follows:

Alcan Foils

Majority of plumbing/steamfitting work construction (minor)

90% is performed by millwright mechanics

10% is contracted out

No qualified plumbers/steamfitters employed

4 millwright with certificates of qualification (industrial)

Majority of work - construction (minor)

1/2 being breakdown repair

1/2 continuous upgrade

Millwright work only contracted out during demand surges.

Bracebridge

Majority of plumbing/steamfitting work construction (minor)

90% performed by millwright mechanics

10% is contracted out, including to U.A. affiliated contractors

No qualified plumber/steamfitter employed

8 millwrights with certificates of qualification [6 industrial / 2 construction]

Less than 5% millwright work contracted out, only when special skills or tools required

Majority of millwright work - construction (minor)

Kingston

Majority of plumbing/steamfitting work construction (minor)

90% performed by employees

2 qualified plumber/steamfitters [1 construction - who is currently on lay-off but within recall period - 1 industrial]

50% of plumbing/steamfitting work is performed by millwrights

26 millwrights with certificates of qualification

[all have industrial certificates - 12 have construction certificates]

Majority of work - construction (minor)

Parties agree that the use of the descriptor "minor" in relation to the construction work performed by the members of USWA and IAM is for the purposes of this hearing only and shall not be referred to or relied upon in any future proceedings by any of the parties herein. (sic)

14. The primary basis for the arguments of Alcan and the two intervening unions is that construction work is carried on in the various Alcan plants, and that to the extent that Alcan uses its own employees to do this construction work at its Bracebridge, Kingston or Toronto plants where the Steelworkers or Machinists have bargaining rights, the work is performed by employees which those unions represent under the respective collective agreements already in place at those plants.

15. There are four collective agreements in evidence. "Bracebridge Works, Alcan Cable Division of Alcan Aluminium Limited" and United Steelworkers of America, Local 7949 are parties to a collective agreement which includes the following provisions:

Article 2

APPLICATION

2.01 This Agreement shall apply to all the Company's employees whilst employed at Bracebridge Works, save and except Team Coordinators, persons above the rank of Team Coordinator, laboratory personnel, office and sales staff.

2.02 Appendices of the Agreement are an integral part thereof, and the provisions of this Agreement and Appendices shall be read and construed together.

Appendix I	- Wage Rates
Appendix I(a)	- Job Classification & Pay Grade
Appendix II	- Overtime Fill Procedure for Weekend Work

Article 3

UNION RECOGNITION, SECURITY

3.01 The Company recognizes the Union as the sole and exclusive bargaining agent with respect to all matters covered by this Agreement for all employees of the Company whilst employed at Bracebridge Works as set forth in Section 2.01.

There is no "millwright" or "plumber/pipefitter" job classification in this collective agreement, but as is apparent from the agreed facts as aforesaid, there are 8 bargaining unit employees classified as "mechanics" who are qualified as millwrights and who perform construction plumbing/steamfitting and millwright work under the collective agreement.

16. "Alcan Rolled Products Company, Kingston Works" and United Steelworkers of America, Local Union 343 are parties to a collective agreement which contains the following recognition clause:

SECTION II - RECOGNITION

2.01 The Company recognizes the Union as certified by order of the Ontario Labour Relations Board, dated the 4th day of April 1945, as the sole collective bargaining agent for all the Company's employees of the Kingston Works, save and except Security Officers, employees of the Maintenance Departments, the Machine Shop, Instrumentation, Boiler and Compressor Room and Heating Departments or those engaged in a confidential capacity.

That Steelworkers' Local has not intervened in this proceeding and there is nothing which suggests that millwrights or plumber/steamfitter work is performed under what appears to be a "production" collective agreement.

17. However, Alcan Rolled Products Company, Kingston Works is also bound by a collective agreement with International Association of Machinists and Aerospace Workers Lodge 54 which contains the following recognition clause:

SECTION II

RECOGNITION

2.01 The Company recognizes the Union as certified by Order of the Ontario Labour Relations Board, dated the 4th day of April, 1945, as the sole collective bargaining agent for all the Company's employees at its Kingston Works save and except production workers, office staff, supervisory staff, including Foremen, Security Officers and factory clerks.

This is in effect a "maintenance" agreement. It contains both "plumber" and "pipefitter" classifications, and although it has no "millwright" classification as such, there are 26 individuals who are qualified millwrights, and there is construction plumbing/pipefitting, and construction millwright work performed at the Kingston Plant under this collective agreement.

18. "Alcan Foil Products, Division of Alcan Aluminium Limited" and United Steelworkers of America, Local 8754 are parties to a collective agreement which provides that:

Article 2

RECOGNITION

2.01 The Company recognizes the Union as the sole and exclusive bargaining agent for all of its employees at its premises in the Municipality of Metropolitan Toronto save and except supervisors, persons above those ranks, office and sales staff and students employed during the school vacation periods.

• • •

2.03 The words "employee" and "employees" where used in this Agreement shall mean only those persons employed by the Company as members of the aforesaid bargaining unit.

This collective agreement contains no "plumber" or "pipefitter" classification, and there are no employees in the bargaining unit who are qualified as plumbers or steamfitters. It does however contain an "industrial millwright mechanical" classification, and there are four bargaining unit employees who possess industrial knowledge certificates of qualification, and who perform construction work as indicated in the agreed facts.

(b) Argument

19. Counsel for Alcan reiterated Alcan's position that the bargaining units in both applications should be restricted to its Chemicals division. Although Alcan made some brief further submissions in that respect, for the most part the employer (quite rightly) relied on counsels' submissions in phase 1 of the proceeding in that respect.

20. Alcan also supported the intervening trade unions' proposition that at the very least, the bargaining unit descriptions should contain the sort of "save and except" provisions which would make it clear that any bargaining rights gained by the applicants herein did not affect the existing bargaining rights at the Kingston, Bracebridge or Toronto plants. Alcan relied upon the Board's decision in *Corporation of the City of St. Thomas*, [1993] OLRB Rep. May 408 and sought to distinguish the decisions in *Corporation of the City of Etobicoke*, [1983] OLRB Rep. Nov. 1825; *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1305; *Ellis-Don Limited*, [1988] OLRB Rep. Dec.

1254 (application for reconsideration dismissed [1989] OLRB Rep. Mar. 234); and *Semple-Gooder Roofing Ltd.*, [1983] OLRB Rep. Nov. 1908.

21. The Steelworkers and Machinists referred to the Board's decisions in *The Georgian Building Corporation*, [1981] OLRB Rep. Mar. 275; *Gottcon Contractors Limited*, [1990] OLRB Rep. Jan. 25; *Pickering Welding & Steel Supply*, [1987] OLRB Rep. April 595; and also to the *Corporation of the City of St. Thomas*, *supra*. Counsel argued that the Board has always been prepared to ensure that existing bargaining rights are not affected by an application for certification, and that the fact that the issue in this case concerns the interplay between non-construction and construction bargaining units rather than only one type or the other should make no difference in that respect. Counsel submitted that the *Semple-Gooder Roofing*, *supra*, reasoning was not applicable in these circumstances, and that it is necessary to in effect "carve-out" the existing Steelworkers and Machinists' bargaining rights from the applicant's bargaining unit. Counsel conceded that doing so would not eliminate the possibility of jurisdictional disputes arising, but submitted that it would send a labour relations message to the parties in that respect, and accordingly, counsel submitted that it would be appropriate to include the words "save and except employees in bargaining units for which any trade union held bargaining rights as of November 28, 1996", or in the alternative to limit the applicant's bargaining rights to Alcan's Chemicals division.

22. The applicants submitted that there is no basis for limiting the bargaining units herein to the Alcan's Chemicals division. Counsel submitted that the intervening trade unions hold no bargaining rights for construction employees, and referred the Board to *Ecodyne Limited*, [1979] OLRB Rep. July 629 in support of their proposition that the mere fact that a collective agreement has been applied to work or employees does not establish bargaining rights in that respect. Counsel relied upon the *Corporation of the City of Etobicoke*, *supra*, decision and submitted that the *Corporation of the City of St. Thomas*, *supra*, decision, which makes no reference to the earlier *Corporation of the City of Etobicoke*, *supra* decision, is wrongly decided. The applicants pointed to the *Runnymede Development Corporation Limited*, *supra*, decision and argued that the issue is one of bargaining rights, not of who does the work, and that the intervening trade unions have no bargaining rights for the trades or crafts which the bargaining units in these applications are made up of, and that neither they nor Alcan have suggested any cogent reason to describe the bargaining units herein in any other than the usual way; that is, without restricting the bargaining units to Alcan's Chemicals division, or using the "save and except" language suggested.

(c) Decision

23. The *Labour Relations Act, 1995* is the cornerstone of labour relations legislation in Ontario. It is through this Act, and through other specialized labour relations legislation (such as the *Colleges Collective Bargaining Act* and the *School Boards and Teachers Collective Bargaining Act*, for example) that trade unions are recognized as vehicles through which employees can bargain collectively with employers. The current Act has its roots in the *Collective Bargaining Act, 1943*, which abolished the common-law doctrines of conspiracy and restraint of trade insofar as these applied to trade unions, which recognized trade unions as legal entities for collective bargaining purposes, and which gave employees the right to join trade unions and bargain through them with employers. The Act has changed a great deal over the course of its 54 year history. However, the fundamental purposes of the Act have remained constant throughout, and the evolution of the Act has been marked by efforts to further these fundamental purposes, namely:

- (a) to ensure the right of employees to freely choose whether or not to join a trade union, and if they choose to do so, to bargain collectively with their employer through a trade union;

- (b) to facilitate collective bargaining, and the orderly, expeditious and peaceful resolution of workplace disputes.

24. Today, the Act provides a sophisticated legislative scheme which establishes the means by which collective bargaining rights are gained or lost, primarily on the basis of some expression of employee wishes, by providing a framework for collective bargaining and requiring that workplace disputes during the term of a collective agreement be resolved through a grievance arbitration process, without recourse to economic sanctions, and by attaching a duty of fair representation to representation rights (for both trade unions and employers' organizations). The Act creates a web of rights, duties and obligations, and provides a system of checks and balances for the competing and sometimes conflicting rights of employees, trade unions and employers. As a general matter, these rights are mutually exclusive such that the rights of one of employees, trade unions and employers end where the rights of one of the others begin. To put it another way, the exercise of rights under the Act by one is checked or balanced by the existence of an obligation or right of another.

25. This remains the case under the current Act, and while employers have rights under the Act, the purpose of the Act has been to provide a more equitable balance of power and labour relations between employers and their employees. This has been accomplished by giving rights to employees and trade unions which they do not have under the common law and have not otherwise enjoyed, which rights operate to check and limit the rights employers have enjoyed outside of labour relations legislation and specifically the Act. Under the Act, the focus has always been on the rights of employees and trade unions, primarily as against employers. The keystone of this focus has always been bargaining rights.

26. Accordingly, the Act operates to preserve and protect established bargaining rights against erosion by employers, or incursion by other trade unions. Concomitantly, the Board's jurisprudence demonstrates a well-established practice of recognizing and preserving existing bargaining rights. In the result, the Act has (always) been interpreted and applied with a view to promoting labour relations peace and stability.

27. This is readily apparent from the Board's approach to applications for certification with respect to employees in workplaces or where bargaining rights have already been established (as demonstrated in decisions like *Gottcon Contractors*, *supra*, and *The Georgian Building Corporation*, *supra*). Where an employer already has one or more trade union collective bargaining partners, the established bargaining rights operate to prohibit or limit a subsequent application for certification with respect to employees to whom those bargaining rights apply. The Act provides that during certain limited periods a trade union can make an application for certification for employees who are already represented by another trade union. Such displacement applications are prohibited outside of these "open periods" established under the Act.

28. Even where a trade union makes an application for certification with respect to employees who are unrepresented, it is sometimes necessary to make it clear that the bargaining unit applied for does not include employees who are already represented by a (usually another) trade union, particularly where the application is made outside of an open period. This is generally accomplished by including some "save and except" language, like that suggested by the intervening trade unions in these applications, in the bargaining unit description. It is *not* generally accomplished by limiting the bargaining unit to a part or "division" of the employer. The latter has a different purpose altogether; namely, to identify the employer entity which is the subject of particular bargaining rights - and not to describe the employees to whom the bargaining rights attach, which as the label suggests, is the function of the bargaining unit description.

29. The Board has a discretion in dealing with bargaining unit description issues, whether these issues relate to questions of geographic scope or other matters. This is appropriate because it permits

the Board, as an expert labour relations tribunal, some latitude in structuring appropriate bargaining units. However, the Board's discretion is directed by the Act, and the degree of discretion which the Board has is not the same in every case. It is axiomatic that the discretion which the Board has in a particular case depends upon the direction which the Act provides.

30. For instance, the Act has long provided that: "upon an application or certification, the Board shall determine the unit of employees that is appropriate for collective bargaining ...". The Board has always considered that trade unions are generally able to make their own assessment of the bargaining unit which is appropriate for their collective bargaining purposes. Accordingly, in order to give trade unions the appropriate leeway in selecting their bargaining units, the Board has treated the legislative direction to determine "the appropriate bargaining unit" to be a direction to determine a bargaining unit which is *an* appropriate one in the particular application, rather than to try to determine the *most* appropriate bargaining unit. In this respect then, the Board exercises a very broad discretion indeed.

31. When it comes to "craft" units (section 9(3)), units of professional engineers (section 9(4)), or units consisting solely of dependent contractors (section 9(5)), the Board is given some more specific direction in terms of the employee composition of bargaining units, but still retains a broad discretion with respect to geographic scope.

32. In that latter respect, sometimes the Board will restrict a bargaining unit to a particular location, particularly in the retail industry. But that is not the Board's general practice. Seventeen years ago, in *York Steel Construction Limited*, [1980] OLRB Rep. Feb. 293, the Board described its practice regarding the geographic scope of bargaining units as follows:

6. The Board in *Wix Corp. Ltd.*, [1975] OLRB Rep. Aug. 637 canvassed in some detail the Board's practice with respect to defining geographic limitations in the appropriate bargaining unit. *Apart from the construction* and perhaps certain service industries, the Board's policy, where the employer has employees at only one location within a municipal area, is to describe the bargaining unit in terms of the municipality itself (*Perimeter Industries Limited*, [1973] OLRB Rep. March 174). On occasion the Board will expand its definition of the bargaining unit to encompass an area greater than a single municipality (see *The Board of Health of the York-Oshawa District Health Unit*, [1969] OLRB Rep. Feb. 1178; *The Adams Furniture Company Limited*, [1975] OLRB Rep. June 491; and note as well the Board's normal unit of "the Municipality of Metropolitan Toronto"), but is reluctant to do so in the absence of compelling reasons (*Wittich's Bread Limited*, [1969] OLRB Rep. Jan. 1019; *Del Zotto*, [1972] OLRB Rep. June 637 and *Canada Safeway Limited*, [1972] OLRB Rep. Mar. 262). The primary reason for this policy of municipality-wide bargaining units is the Board's concern for stability of bargaining rights; i.e., the union's bargaining rights will not be affected by a subsequent move of the employer's operation to some other location within the same municipality. On the other hand, actual accretions to the employer's operations within the municipality, such as a second or third plant, will automatically be covered by the union's certificate. To this latter extent, the right of self-determination of a bargaining agent by the employees at these new locations is compromised, in favour of the over-riding concern for stability of bargaining rights.

[emphasis added]

33. In *York Steel*, *supra*, the Board noted that things were different in the construction industry. Indeed, the construction industry has always been "different". In my March 10, 1997 decision herein, and also in *Ontario Hydro*, [1997] OLRB Rep. Jan./Feb. 82, I observed that the differences between construction and non-construction labour relations have been legislatively recognized in the Act since 1962 when the *Labour Relations Act, 1961-62* was passed. In that respect, at paragraphs 26 to 28 of the *Ontario Hydro*, *supra*, decision, I wrote that:

26. Primarily in response to the "Goldenberg Report" in 1962, the *Labour Relations Amendment Act, 1961-62* was passed, and for the first time, the Act included provisions which recognized that construction labour relations were "different". For the first time, a separate part of the Act was

devoted to the construction industry. It consisted of only six sections but included a definition of “trade union” in exactly the same words as are found in section 126 today, provided for certification by geographic area rather than by project or location, contained notice to bargain and conciliation provisions, and included a provision relating to when a termination application could be brought.

27. Since then, the evolution of the Act has continued to include changes reflecting an ever increasing awareness of the differences between construction and non-construction labour relations, and the need to address the peculiar needs of the construction industry directly in the Act. Construction industry certification proceedings became more expedited. In 1962, provision was made for a construction division of the Board. In 1970, in an attempt to equalize bargaining power in the construction industry, the Act was amended to establish an accreditation system for employers organizations.

28. In response to the “Franks Report”, the Act was amended in 1977 to provide for a comprehensive scheme of province-wide bargaining for the traditional building trades unions in the industrial, commercial and institutional (“ICI”) sector of the construction industry. This scheme was designed to encompass the unions and employers which dominated labour relations in the ICI sector of the construction industry. Further amendments, which came into effect on May 1, 1980, extended ICI bargaining rights to the entire province, prohibited selective strikes and lock-outs, and established a ratification procedure for the provincial ICI agreements.

(See also the comments of the Divisional Court in that respect in *Re International Union of Operating Engineers and Traugott Construction*, (1984) 6 D.L.R. (4th) 122).

34. As I observed in the March 10, 1997 decision (at paragraph 50) herein, one result of all this is that we have in this province a certification scheme for the construction industry which is both separate and quite different from the one established for non-construction industries. The differences appear both in the manner in which applications for certification are dealt with, and more specifically in how bargaining units are described.

35. While there are exceptions, particularly when it comes to craft or “craft-like” units, non-construction bargaining units are generally described in terms of “all employees save and except” perhaps certain kinds of employees, and persons at or above the first level of management (which is redundant for purposes of Board proceedings since persons who are “management” are not “employees” for purposes of the Act but is included in order to give greater clarity to bargaining unit descriptions by identifying the first managerial level).

36. On the other hand, construction bargaining units are described in terms of specific trades or crafts (except in the case of construction operating engineers where the bargaining unit is described in terms of the construction work they engage in, and which work defines the trade) and include “working foremen”. Typically, construction collective agreements cover specific employees defined by the trade they work at and assert a trade work jurisdiction for these employees. An important difference (for these applications) is immediately apparent: construction bargaining units are specifically restricted to construction employees, but non-construction bargaining units are not. Although none come immediately to mind, there may be some “non-construction” collective agreements which specifically exclude construction work or employees. But the vast majority do not, and I am unaware of any Board determined bargaining units which specifically do so. Indeed, this is an issue which the Board is typically not asked to address. Nor is it apparent that parties to a non-construction application for certification consider whether the employer has employees who regularly or periodically perform construction work to the extent that on the Board’s test they are construction employees, either normally or from time to time. Accordingly, whether “all employees” means precisely that; that is, all employees regardless of the work they perform and subject only to the express exclusions; or whether a non-construction bargaining unit presumptively excludes any construction employees of an employer, is not an issue which has been directly addressed by the Board. (Nor is it raised as an issue in this case).

37. Another difference is the one suggested in the *York Steel, supra*, decision; that is, in the geographic scope of bargaining units. As a general matter, the geographic scope of non-construction bargaining units is narrower than that of a construction industry bargaining unit. Again, there are exceptions (occasional teacher and security guard units come to mind), but the largest geographic area covered by a non-construction bargaining unit is generally a municipal area; that is, a local political division. It can be much smaller, but if it is it tends to be restricted to a particular municipal location or address (as in the case of retail or service industry employers which have more than one location within an otherwise appropriate municipal area in circumstances where it is not appropriate, either because the parties agree or otherwise, to include all of these in the bargaining unit). In contrast, construction industry bargaining units cover much larger geographic areas. Indeed, where a construction trade union (that is a “trade union” within the meaning of section 126 of the Act) makes an application for certification in the construction industry (i.e. an application for certification within the meaning of sections 128 and 158), section 128 of the Act directs that the Board “determine the unit of employees that is appropriate for collective bargaining by reference to a *geographic area* and it shall *not* confine the unit to a *particular project*” [emphasis added]. Further, the Act has created a provincial bargaining structure for the industrial, commercial and institutional sector of the construction industry such that a construction trade union which is an affiliated bargaining agent of a designated employee bargaining agency (as defined in the Act) is entitled to a province-wide bargaining unit in the industrial, commercial and institutional (“ICI”) sector. Indeed, such a trade union has no choice in that respect. If it wishes to obtain ICI bargaining rights, it must apply for a province-wide bargaining unit. Even for construction trade unions which are not affiliated bargaining agents, or in applications for certification (or voluntary recognition agreements) which do not apply to the ICI sector, the geographic scope of a construction bargaining unit is defined in terms of the 32 geographic areas which have been established by the Board in that respect (or if the job site is in one of the so-called “white areas” in terms of the geographic township the site is in and the 8 geographic townships surrounding it). There is a great deal of variation in the size of these “Board areas”, but all of them are significantly larger than the typical non-construction bargaining unit geographic area. Some Board areas are quite large, and all of them include more than one or parts of more than one municipal or other political unit. Indeed, these Board areas were established having regard primarily to patterns of collective bargaining and local geographic jurisdictions, without more than a very general regard to municipal or other political boundaries.

38. Until recently, none of this presented any significant problems, partly because of the historical separation between construction industry and non-construction trade unions in terms of the employees they seek to represent and the work these employees perform, partly because of the amount of construction work performed under non-construction collective agreements has tended not to be significant in the overall scheme of things (the Ontario Hydro situation may be the most obvious exception to this), and partly because until recently the overall employment picture in the construction industry has been good. Nevertheless, the line between non-construction and construction bargaining rights is neither narrow nor clear, and the two regimes have co-existed somewhat uneasily.

39. With this in mind, I turn first to the assertion by Alcan (also made in the alternative by the Steelworkers and Machinists) that the bargaining units in these applications should be described in terms of the Chemicals’ division rather than in terms of Alcan. In that respect, the question is this: is it appropriate to restrict the bargaining rights which are the subject of these applications to construction employees who work in or at a plant of the particular division where the construction work in which the employees who are the subject of these applications were engaged at the time the applications were made, along with a smaller physically separated plant in the same division in which no construction work was being carried on at the time?

40. *Prima facie*, it is not appropriate to do so. *Prima facie* it is appropriate to describe a bargaining unit in terms of the employer party as such and not in terms of some part of the employer.

41. Nor is the Board satisfied that there is any cogent reason to describe the bargaining unit in terms of a part of Alcan, namely its Chemicals division, in these applications.

42. As I pointed out in paragraph 53 of the March 10, 1997 decision herein, construction industry bargaining units, unlike non-construction bargaining units, generally neither depend upon nor reflect an employer's internal structure, and as a general matter the Board has not found it appropriate to limit a construction bargaining unit description to a "division" of an employer except on agreement of the parties, or where the division is either in fact the only division of the employer, and therefor reflects the actual name of the employer, or is the only part or division of the employer which performs construction work as a separate entity.

43. That is not the case in these applications. As I found in my March 10, 1997 decision, construction work of any significance may be proposed and supervised on a day-to-day basis at the plant or division level, but it is subject to approval and financing at a higher corporate level. That is, construction activities within Alcan are centrally controlled. Further, it is patently obvious that Alcan does not have a construction "division", and that construction activities are not limited to a particular division. Nor is the fact that construction work may be performed regularly (although not necessarily continuously or daily) in the various Alcan plants, including in the Chemicals' division plants, either under a non-construction collective agreement or otherwise, a reason to limit the bargaining unit to a part of Alcan. To the extent that such work is performed under an existing collective agreement, in these applications it is a matter which is relevant, if it is relevant at all, to the issue of what if anything is necessary to recognize and preserve the existing bargaining rights as exercised under those collective agreements, and potentially to a jurisdictional dispute complaint if one arises. It is not a matter which pertains to the question of "who is the employer" or how the employer is to be identified for collective bargaining purposes. Indeed, to limit the bargaining unit description to the Chemicals' division would go much further than could possibly be necessary to protect any existing collective bargaining interests because the limitation would apply to exclude present or future Alcan operations outside of Chemicals at which no other trade union holds relevant bargaining rights.

44. Finally, although acceding to Alcan's request would not confine the bargaining unit to a particular project, something which is prohibited by section 128(1) of the Act, it would come close to doing so and would have a similar effect. For this reason alone, it would therefore be inappropriate to limit the bargaining units herein to Alcan's Chemicals division.

45. I now turn to the assertion that some appropriate "save and except" language ought to be included in a bargaining unit in order to recognize and preserve the existing bargaining rights of the Steelworkers and Machinists as aforesaid.

46. In *Ecodyne Limited*, *supra*, the Board was presented with a situation where contractors bound by local area agreements applied those agreements to their employees when they worked on Ontario Hydro jobs notwithstanding that those employees were not covered by the scope clause of the local agreements. The Board held that the mere fact that the terms of a collective agreement were applied to certain work and employees does not mean that the union party to the collective agreement therefore holds bargaining rights for the employees involved. The Board in that case went on to observe that:

... it is not at all uncommon in the construction industry for employers not formally bound to a collective agreement to nevertheless employ union members under the same terms and conditions as set forth in a collective agreement without any intention of thereby conferring bargaining rights on the union. Similarly, trade unions in such circumstances sometimes refrain from applying to the Board to be certified as the legal bargaining agent of the employees involved notwithstanding the fact that the employees are union members.

With respect, the Board's observation and conclusion in *Ecodyne Limited, supra*, is as true today as it was in 1979 - as far as it goes. Sometimes, the effect of an agreement between an employer and a trade union to apply a collective agreement to work or employees which would otherwise not be covered by the collective agreement *does* have the effect of extending the trade union's bargaining rights to such work or employees. Whether it does or doesn't do so depends upon the mutual intent of the parties.

47. Indeed, that appears to be the basis for the Board's decisions in *The Corporation of the City of Etobicoke, supra*, and *Corporation of the City of St. Thomas, supra*. At the very least, these decisions can be reconciled on this basis. However, these decisions and the issue bear further examination.

48. *The Corporation of the City of Etobicoke, supra*, was an application for certification in the construction industry by the International Union of Bricklayers and Allied Craftsmen, Local 2 ("Brick 2") for its standard bricklayers and stonemasons bargaining unit under what is now section 158(1) of the Act. The employer asserted that an existing collective agreement it had with a non-construction union, The Borough of Etobicoke Civic Employees Local Union No. 185, was a bar to the application on the basis that that collective agreement covered bricklayers performing construction work. However, the incumbent trade union ("Local 185") agreed with Brick 2 that it did not, and that the existing collective agreement was therefore not a bar to the application. The Board concluded that the collective agreement was unambiguous and did not cover construction work performed by bricklayers. The significant point is that whether or not the employer had employed bricklayers to perform construction work and had applied the terms of the existing collective agreement with Local 185 to them, it and Local 185 had not agreed that the collective agreement and the union's bargaining rights extended to such employees; that is, the employer and Local 185 did not mutually intend that bargaining rights be extended in such a manner.

49. In *Corporation of the City of St. Thomas, supra*, on the other hand, the International Union of Bricklayers and Allied Craftsmen, Local 5 and the Labourers' International Union of North America, Local 1059 each applied for their standard craft bargaining units under what is now section 158(1) of the Act. They were faced with the response from the employer and an intervention by the Canadian Union of Public Employees, a non-construction union, that the applications were barred by a collective agreement between the employer and CUPE, Local 35 ("Local 35") which covered the bargaining units and therefore the employees with respect to which the applications were brought. The decision in that case, which does not refer to the earlier *Corporation of the City of Etobicoke, supra*, decision, reveals that the Board heard extrinsic evidence on the issue and concluded that:

11. The Board is satisfied that the collective agreement applies to the groups of employees whom the applicants seek to represent. The recognition clause covers all employees of the City in its "outside" departments. The only specific exclusions are foremen and those above the rank of foremen, and employees covered under the agreement of Local 841 (which is the CUPE "inside" local). The wording of the recognition clause is not always determinative of the issue, but in this case, the evidence is consistent with the terms of the agreement in establishing that it was meant to apply to all outside workers, including those engaged in construction work. Crossing guards, who are arguably "outside" workers, are apparently covered by a part-time collective agreement with Local 841, but are in any event employed by the engineering section of the City's operations, and not by the departments listed in the Local 35 agreement. We do not view this as significant in determining the intent of the Local 35 agreement.

12. It is also not significant to us that there are no specific wages in the agreement for bricklayers or construction labourers. Until 1992, the City relied on employees with a variety of skills to perform its construction work, rather than employees who were highly specialized. The lack of classifications for specific construction trades does not lead to the conclusion that in the event the City decided to create such classifications, CUPE would not be entitled to represent these employees. In fact, in 1992, the City decided to hire two bricklayers as part of the job creation programs. We are satisfied that the City looked to CUPE to consent to the special arrangements and that CUPE agreed. The evidence of these discussions is consistent with an understanding that CUPE represents

all outside workers hired by the City. It does not support the conclusion that CUPE has bargaining rights for employees with general skills who sometimes work in construction, but not for employees hired for specialized construction skills, if the City hired them. It also does not support the conclusion that CUPE intended to abandon bargaining rights for bricklayers, labourers, casual labourers, or construction employees hired under job creation programs.

In other words, although the existing collective agreement did not on its face clearly cover the employees whom the applicants in those two applications sought to represent, the Board was satisfied that the collective agreement had been applied to such employees, and that the employer and Local 35 mutually intended that the collective agreement extend to them, and that CUPE therefore already held bargaining rights for them.

50. The Board in *Corporation of the City of St. Thomas, supra*, went on to comment that:

13. Our findings are consistent with those in the cases submitted by counsel for the applicants. For instance, *Runnymede Development Corporation Limited, supra*, involved bargaining units described in terms of specific construction trades. There, the Board found that the “mere fact that members of one trade union, pursuant to the terms of a collective agreement, perform work that members of another trade union perform as well (for other employers), does not mean that that collective agreement covers that other trade.” That case did not involve a collective agreement which on its face applies to “all employees”. The present case is also distinguishable from *E K T Industries Inc., supra*, in which the Board found that despite an “all employee” recognition clause, the union in question represented and only claimed to represent construction labourers.

51. In *Runnymede Development Corporation, supra*, Carpenters Local 27 applied for its standard section 158(1) (section 144(1) at the time) bargaining unit of carpenters and carpenters’ apprentices. Labourers’ Local 183 intervened, asserting that the employees who were the subject of the application were covered by a collective agreement between it and the Metropolitan Toronto Apartment Builders’ Association (the “MTABA Agreement”), by which the responding employer was bound pursuant to a “cross-over” provision in a collective agreement between Labourers’ Local 183 and the Toronto Housing Labour Bureau (the “Housing Bureau Agreement”). The Board concluded that although the employer was not a member of the MTABA and was not a party to the MTABA Agreement as such, it was bound to apply the terms and conditions of the MTABA Agreement as though it was a part of the Housing Bureau Agreement by which the employer was directly bound. The Board went on to find that:

21. In Article 1 of the Housing Bureau Agreement, the employers who are bound by that agreement recognize the intervener as the bargaining agent of their “Construction Employees”. However, that very broad term is restrictively defined in terms of the nature of work performed. Pursuant to Article 1.01(a), “Construction Employees” are those “(whose Classifications fall into a category listed in Schedule “A” attached hereto) engaged in the on site construction of all type of low rise housing only and their natural amenities ...”. Article 6.01 of Schedule “A” goes on to define “Construction Employees” as being those who perform any or all of a series of listed work or job functions, all of which are, particularly in the industrial, commercial and institutional sector of the construction industry, commonly associated with construction labourers. In addition, unlike the Residential Housing Carpentry Agreement, to which the intervener is also a party and which is a collective agreement referred to in Article 1.03(a)(iii), the Housing Bureau Agreement makes no reference to carpenters or carpenters’ apprentices and contains only one wage rate which applies to all of the work performed under it. In our view, the provision in Article 6.1 of Schedule “A” that the job functions listed “shall in no way be limited [thereto], which is intended as a general description only ...” at best means no more than that other work or functions similar in nature to those listed are also covered by the agreement. Consequently, the intervener is not, in our view, the bargaining agent for all “Construction Employees” of employers bound by the Housing Bureau Agreement but only for those employees of such employers in the listed and analogous classifications.

22. Except for bargaining units of or including operating engineers, it is the long-standing practice of the Board to describe bargaining units in the construction industry in terms of trades or crafts (for our purposes these terms are synonymous) rather than in terms of the work performed. This practice recognizes that trade union representation in the construction industry has traditionally been along trade lines and attempts to avoid interfering with established trade union work jurisdictions (see *Robertson-Yates Corporation Limited*, [1979] OLRB Rep. April 344; *Semple-Gooder Roofing Ltd.*, [1983] OLRB Rep. Nov. 1908). Unfortunately, the work jurisdictions of trades do overlap. In addition, as we have already noted, collective agreements in the construction industry often identify the employees in the bargaining unit to which they apply in terms of the work they perform. As a general rule, there is no necessary congruence between the bargaining rights held by a trade union and its work jurisdiction. Consequently, a construction industry trade union does not necessarily have a general absolute right to a particular kind of work, even though that work may be performed by employees whom it represents (which in the construction industry usually means its members) pursuant to the terms of one or more collective agreements. The fact is that, in the construction industry, more than one trade union may have bargaining rights for employees who, though described in terms of different job categories, perform some of the same work. These overlaps give rise to competing claims for work between trade unions; that is, jurisdictional disputes (see for example *Toronto Star Newspaper Limited*, [1979] OLRB Rep. May 451). An application for certification is not the appropriate forum for settling such disputes or for determining the jurisdictional limits of trade unions (*Industrial Lighting and Contracting Limited*, [1979] OLRB Rep. Oct. 985). Further, because the Board's practice in the construction industry is to describe bargaining units in terms of trade rather than work performed, the mere fact that members of one trade union, pursuant to the terms of a collective agreement, perform work that members of another trade union perform as well (for other employers), does not mean that that collective agreement covers that other trade (see *The Frid Construction Company Limited*, [1975] OLRB Rep. March 146; *Graff Diamond Products* (Board File No. 2817-86-R) decision dated June 29, 1987, unreported).

23. Some of the work covered by the Housing Bureau Agreement is work which can be, and is, performed by either construction labourers, or by carpenters or carpenters' apprentices; that is, it is work over which both trades assert jurisdiction. In other words, some of the work covered by the Housing Bureau Agreement can be done by either members of the United Brotherhood of Carpenters and Joiners of America, (the "Carpenters") or by members of the Labourers' International Union of North America (the "Labourers"). It is both "labourers work" and "carpenters work". In such circumstances, the work being performed cannot be determinative of the trade of the person performing it; that is, it is not work belonging to the Labourers just because a labourer is doing it, nor is it work belonging to the Carpenters just because a carpenter or carpenter's apprentice is doing it. An employee is not a construction labourer merely because s/he is doing work that a construction labourer sometimes does if carpenters also perform that work as part of their trade. Consequently, the fact that members of the intervener sometimes perform work (for the respondent) that carpenters also do does not mean that the intervener represents all carpenters employed by the respondent.

In the result, the Board went on to conclude that notwithstanding that carpentry work was being performed by employees for whom Labourers' Local 183 held bargaining rights, Local 183 did not hold bargaining rights for the *carpenters* for whom Local 27 sought to be certified, a conclusion which is consistent with the *Ecodyne*, *supra*, analysis.

52. Accordingly, the ratio of the *Corporation of the City of St. Thomas*, *supra*, decision must be that notwithstanding that there were no "bricklayer" or "construction labourer" classifications in the existing collective agreement (although there were "casual labour" and "student labourer" classifications in it), the employer and CUPE Local 35 in that case mutually intended that their collective agreement applied to and they did in fact apply it to bricklayers and construction labourers, the employees in issue in the applications by Brick Local 5 and Labourers' Local 1059 in that case.

53. I have already observed that it is not uncommon for construction employees to be included in bargaining units under non-construction collective agreements, and for construction work to be performed under non-construction collective agreements. It is also true that non-construction work is performed by construction employees under construction collective agreements, but to a lesser extent.

(I note that in determining who is or is not a “construction employee”, the test which the Board has consistently employed since 1987 is the one outlined in *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 and *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41: any employee who spends a majority of his/her time performing construction work on a particular day is a “construction employee” on that day for purposes of proceedings under the Act.)

54. Whether or not they would be construction employees on the Board’s test, it is clear that employees covered under the Steelworkers or Machinists’ collective agreements with Foil, Cable or Rolled Products, as the case may be, sometimes perform construction work which in the construction industry is performed by plumbers, steamfitters (pipefitters) or millwrights under those collective agreements. It is apparent that the amount of construction work performed under these collective agreements, and the time spent performing construction work by employees in those bargaining units varies. However, it is also apparent that construction work in either trade is *not* performed on a daily basis, or at least not enough of it to make the employees who perform it into construction employees (on a daily basis) according to the Board’s test. In these applications for example, there were no employees under any of the Steelworkers or Machinists’ collective agreements in issue who on the Board’s test would be employees in either of the construction bargaining units applied for.

55. Further, a close examination of the agreed facts is revealing. At the Foil plant, the collective agreement contains no plumber or steamfitter classifications and Alcan has employed no qualified plumbers or steamfitters under the Steelworkers’ collective agreement. The majority of the plumbing and steamfitting work performed at this plant is characterized by the parties as being “minor” construction work, and 90 per cent of it is performed by “millwright mechanics” (none of whom have construction certificates of qualification of any sort). Four millwrights with industrial certificates of qualification at that plant spend a majority of their time either doing breakdown repairs or engaged in continuous upgrade work.

56. In the result, at Foil, none of the plumbing or steamfitting work being performed under the Steelworkers (Local 8754) collective agreement has been performed by plumbers or steamfitters but millwright’ work is being performed under that collective agreement, albeit not by individuals who are millwrights (albeit not construction millwrights). Further, in counsel’s January 29, 1997, letter to the Board in these applications, in which the Steelworkers’ request intervenor status and set out the basis for that request, it is asserted that:

At both locations [a reference to both the Foils’ plant and the Cable plant], the USWA represents employees who perform functions commonly performed by millwrights, although at Bracebridge [the Cable plant], the employees occupy the classification of Tool and Die Mechanic. Similarly, some employees within the USWA bargaining units occasionally perform duties related to plumbing. In the past, employees in these *trades* and covered by the USWA collective agreements *have performed “construction” work*. [emphasis added]

57. On the basis of the materials before the Board, the Steelworkers represents employees who perform work which falls within the plumbing or steamfitting trades at the Foil plant in Toronto, but does not represent plumbers or steamfitters there. However, the Steelworkers does represent employees who are qualified as millwrights and who perform construction work which falls within the millwright trade. Accordingly, the Steelworkers at the Foil plant in Toronto do not represent employees in the trades of plumber or steamfitter, but they do represent employees in the trade of millwright.

58. At the Cable plant in Bracebridge, the situation is even clearer. The Steelworkers (Local 7949) represents millwright mechanics who perform plumbing and steamfitting work, but it does not represent plumbers or steamfitters. On the other hand, the Steelworkers clearly represents millwrights who perform construction work.

59. At Rolled Products plant in Kingston, the Machinists (Lodge 54) represents qualified “plumber/steamfitters” (sic). The fact that 50 per cent of the plumbing and steamfitting work at the facility is performed by persons who are not journeymen or apprentice plumbers or steamfitters is irrelevant to the Board’s considerations. Under its collective agreement with Rolled Products, the Machinists represent construction plumbers and steamfitters. Similarly, although they are not called “millwrights”, qualified millwrights are employed and perform construction millwright work under this collective agreement.

60. It is therefor apparent that Alcan and the Steelworkers have mutually intended that the collective agreements between them cover millwrights employed at the Foil plant in Toronto and at the Cable plant in Bracebridge. Similarly, it is apparent that Alcan and the Millwrights have mutually intended that the collective agreement between them covers plumbers, steamfitters (which are the same as pipefitters for purposes of the Act: see, *D.E. Witmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228), and millwrights at the Rolled Products Plant in Kingston.

61. In the result, the Board is satisfied that some “save and except” exclusionary language is appropriate, but only to the extent necessary to protect the Steelworkers and Machinists existing bargaining rights.

62. In that respect, in an application for certification the Board does not concern itself with issues of work jurisdiction. Applications for certification are about the representation of employees; that is, they are about whether employees do or do not wish to be represented by a trade union which is entitled to bring the application in their employment relations with their employer. Undoubtedly, the acquisition of bargaining rights can have work jurisdiction implications for the employees, for the employer, and for any other trade union which holds bargaining rights for other employees of the employer, but these do not relate to any issue which it is necessary or appropriate for the Board to determine in an employee representation proceeding. On the contrary, work jurisdiction issues are appropriately dealt with under the jurisdictional dispute provisions of section 99 of the Act, and the process which has been specifically designed to deal with such issues (*Semple-Gooder Roofing, supra*; *Industrial Lighting and Contracting Limited*, [1979] OLRB Rep. Oct. 985). This is why the Board describes both construction and non-construction bargaining units in terms of the employees in them rather than the terms of the work performed (except in the anomalous case of construction operating engineers).

63. In this case, the intervenor trade unions concede that there is nothing which the Board can do which will entirely eliminate the potential for work jurisdiction friction between them and the applicants, but suggest that the “save and except” language they have suggested is necessary both to preserve their respective existing bargaining rights and to send a labour relations message regarding jurisdictional disputes which may develop.

64. The Board is satisfied that it is necessary to include something in the bargaining unit description to preserve the Steelworkers and Machinists existing bargaining rights. However, while the Board would have accepted the broad language which the Steelworkers and Machinists suggest if it had been presented as an agreement of the parties, the Board is satisfied that it is both necessary and appropriate to be more specific in that respect having regard to the evidence before the Board.

65. In the result, the Board finds it appropriate to reconsider the bargaining unit determinations in paragraph 5 of the December 3, 1996 decision in Board File No. 2736-96-R, and in paragraph 8 of the December 3, 1996 decision in Board File No. 2743-96-R by revoking those paragraphs and substituting the following therefor:

(a) In Board File No. 2736-96-R:

5. The Board finds, pursuant to section 158(1) of the Act, that all millwrights and millwright apprentices in the employ of Alcan Aluminium Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all millwrights and millwright apprentices in all other sectors of the construction industry in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except millwrights and millwright apprentices employed under the USWA, Local 8754 collective agreement at the Alcan Foil Products Plant in the Municipality of Metropolitan Toronto, millwrights and millwright apprentices employed under the USWA, Local 7949 collective agreement at the Alcan Cable plant in Bracebridge, and millwrights and millwright apprentices employed under the International Association of Machinists and Aerospace Workers Lodge 54 collective agreement at the Alcan Rolled Products Company plant in Kingston, and save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees appropriate for collective bargaining.

(b) In Board File No. 2743-96-R:

8. The Board finds, pursuant to section 158(1) of the Act, that all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Alcan Aluminium in the industrial, commercial and institutional of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Alcan Aluminium Limited in all other sectors of the construction industry in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices employed under the International Association of Machinists and Aerospace Workers Lodge 54 collective agreement at Alcan Rolled Products Company plant in Kingston, and save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees appropriate for collective bargaining.

66. In neither application is either the validity of the order directing the representation vote, or the representation vote itself affected by this determination.

V

Motion to Dismiss Alcan's Allegations

67. I turn now to consider the U.A.'s motion to dismiss Alcan's allegations that it has acted improperly. Essentially, this is in the nature of a "no *prima facie* case" motion.

68. In a letter from counsel dated December 5, 1996, Alcan alleges that:

It is the Responding Party's submission that the Application for Certification by the Applicant ought to be dismissed as a result of the Applicant's conduct in seeking access to the employer's premises for the purposes of obtaining bargaining rights. The Responding Party submits that the Applicant's misrepresentation to the employer with respect to their intentions is such that they ought to be estopped from applying for certification for bargaining rights for this employer.

The employer hired pipefitters through the Kingston local of the union. In October the employer's Construction Manager, Mr. Paul Glaser started hiring people through the business manager of the Applicant, Mr. John Telford. Within a week of the first hires starting work the employer was advised by subcontractors that there was talk that an Application for Certification was being sought by the Applicant. The employer had a meeting with Mr. Telford, the Business Manager for the Applicant, to discuss the matter and obtain his assurance that the rumour was untrue. The employer's representatives met with Mr. Telford on October 22, 1996 for the sole purpose of getting this

assurance. The meeting was attended by Mr. Glaser, Mr. Telford, and Mr. Derek Prichett, Production Manager for the employer and Mr. Roy Meikle, Plant Manager for the employer. At that meeting, the employer was assured by Mr. Telford that his interest was only to seek employment of his members and that as long as Mr. Glaser continued to hire union members only, through him, there would be no Application for Certification by the union at the site. The parties shook hands on that agreement and relied upon it.

Given that the union and the employer had agreed on the conditions of employment for these employees, specifically that the union not be seeking certification for this particular employer, the Board should dismiss the Application for Certification for those employees by the same union, since the union will have gained an unfair advantage and the employer will have been prejudiced by the Application and the breach of the Agreement. As such the employer asks that the Application for Certification by the Applicant be dismissed as a result of the Applicant's conduct.

69. The U.A. responded by letter from counsel dated December 6, 1996, in which it makes "comments" consisting of both factual assertions and representations. I find it unnecessary to set any of these out.

70. Alcan urged the Board to hear the evidence of its allegations and then determine the issue on its merits. The issue identified by Alcan in that respect is the conduct of the U.A. Counsel argued that if the Board declines to even entertain Alcan's allegations, it will be "sending a message" that unions can do whatever they wish without fear of consequences or even review by the Board. Counsel referred to sections 2 and 5 of the Act, and submitted that the U.A., through its representative, Telford, had made a representation upon which Alcan relied to its detriment and that it should at least be in effect estopped from bringing its application for certification here. In that respect, counsel sought to distinguish between the employees who supported the application and the U.A. on the basis that the estoppel it asserted applied only to the trade union. Further, Alcan did not suggest the effect of the U.A.'s alleged conduct should be to disenfranchise any of the bargaining unit employees; that is, to disentitle them from casting a ballot in the representation vote.

71. Assuming as I must that all of Alcan's allegations in this respect are true and provable, I am satisfied that Alcan has not made out a *prima facie* case for the relief it seeks, namely dismissal of the U.A.'s application for certification. Nor is there anything in the allegations which suggest any cogent reason to inquire further into them.

72. It seems that the doctrine of estoppel is sometimes discussed or applied without regard to the distinctions within the general doctrine. For example, there is a difference between estoppel in pais (by conduct or representation) on one hand, and promissory estoppel on the other. The essential elements of any estoppel are the same: that is, an unambiguous representation made with the intention that it will be acted upon, upon which the party which received the representation relies and acts upon to its detriment. In estoppel in pais, however, the representation must be of some existing fact, while, as its label suggests, promissory estoppel requires a representation that a party will do or refrain from doing something in the future. Although it is not obvious that estoppel in pais could not apply in appropriate circumstances, it is the doctrine of promissory estoppel which is most often been applied in labour relations matters (see, for example, *CN/CP Telecommunications and Canadian Telecommunications Union*, (1982) 4 L.A.C. (3d) 205 (Beatty); application for judicial review dismissed by the Divisional Court in (1981) 34 O.R. (2d) 385).

73. It is the doctrine of promissory estoppel which Alcan seeks to invoke in this case. The problem is that the necessary precondition which underlies all estoppels does not exist. All estoppels assume the existence of a legal relationship between the parties to the alleged estoppel. An estoppel is born of a legal relationship and not vice-versa. In this case, there was no legal relationship between Alcan and the U.A. at any material time, and more specifically at the time the alleged representation that the U.A. would not apply for certification was made.

74. Accordingly, the doctrine of estoppel has no application in these circumstances.

75. Even if the relationship between Alcan and the U.A. was one which could give rise to an estoppel, the doctrine does not apply in the circumstances.

76. There can be no estoppel, or waiver, of a public right or statutory requirement. In that respect, it is both trite and an over generalization to say that the *Labour Relations Act, 1995* is remedial legislation which is an instrument of public policy designed to protect or advance the public interest. Indeed, there are a few public statutes which do not involve the protection or advancement of the public interest. This does not mean that equitable doctrines such as estoppel or waiver do not apply to any part of the *Labour Relations Act, 1995*. It is well-established, for example, that the unlawful strike and unlawful lock-out provisions cannot be contracted out of and are therefore not subject to estoppel or waiver (which are after all doctrines which apply to both “contractual” relations). On the other hand, section 56 of the Act provides an example of a provision in which can be affected by an equitable doctrine. It is well-established that notwithstanding that section 56 provides that a collective agreement is binding on the employer, trade union and employees in the bargaining unit defined in the collective agreement, a party may be estopped from enforcing a right or obligation under the collective agreement in appropriate circumstances.

77. Accordingly, the question which must be addressed is the one posited in *Ontario Hydro*, [1990] OLRB Rep. Mar. 305: do Alcan’s allegations raise an issue concerning an application of the Act which involve the protection or advancement of a public interest? Section 2 of the *Labour Relations Act, 1995* specifies its purposes as follows:

2. The following are the purposes of the Act:

1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.
2. To recognize the importance of workplace parties adapting to change.
3. To promote flexibility, productivity and employee involvement in the workplace.
4. To encourage communication between employers and employees in the workplace.
5. To recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions.
6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.
7. To promote the expeditious resolution of workplace disputes.

Further, section 5 provides, as the Act has long provided, that:

5. Every person is free to join a trade union of the person’s own choice and to participate in its lawful activities.

78. It is therefore apparent that *employees’* access to trade unions and collective bargaining is a matter of public interest which is protected in advance by the Act. Accordingly, employees cannot waive or be estopped from exercising their rights under the Act.

79. Whether trade unions’ access to employees and collective bargaining is equally a matter of public interest which is protected and advanced by the Act such that the doctrine of estoppel does not

apply to trade unions which apply for certification is perhaps more open to debate. However, I am satisfied that that is the case. First, that is the very reason why trade unions exist. Indeed, without trade unions there can be no “labour relations” under the *Labour Relations Act, 1995*. Second, this conclusion is consistent with the purposes and scheme of the Act. Collective bargaining cannot be facilitated or even exist without trade unions. One of the workplace “parties” under the Act must be a trade union. Except in a limited circumstances, employee involvement in the workplace under the Act must be through their trade union. Communications between employers and employees do not exclude, or give employers the right to seek to exclude, trade unions. Trade unions are specifically recognized as partners in economic growth, and as the employer’s partners in resolving workplace issues in dispute.

80. Accordingly, I am satisfied that a representation of the sort alleged by Alcan herein cannot operate to estop a trade union from making an application for certification.

81. Even if the doctrine of estoppel could operate to estop a trade union from making an application for certification, I am satisfied that no estoppel has been made out in this case.

82. Alcan’s allegations come down to this:

- (a) Alcan hired members of the U.A. through the U.A.
- (b) *After* at least some of these employees have started to work, talk of an application for certification by the U.A. was brought to Alcan’s attention.
- (c) Alcan arranged a meeting with representatives of the U.A. at which it sought and received assurances that the U.A. would not bring an application for certification.
- (d) The U.A. has reneged on its agreement and gained an unfair advantage to the prejudice of Alcan.

83. There is no suggestion that Alcan’s decision to hire members through the U.A. was anything other than a freely made decision. That is, Alcan freely made a conscious decision to hire members of the U.A. through the union. Alcan must have known, or must be taken to have known, that trade unions are in the business of organizing employees, and obtaining bargaining rights for employees by either certifying or obtaining voluntary recognition agreements with employers to that end. Indeed, that is the reason trade unions exist. That is what they do.

84. It was not until after the first U.A. members were hired that Alcan grew concerned about a possible application for certification, and sought some reassurance from the U.A. in that respect. Assuming that that is not in itself contrary to the Act (which I respectfully suggest is far from clear - see section 70), the U.A.’s response is hardly surprising. While there are various approaches which trade unions adopt in this respect, for most trade unions secrecy in organizing campaigns is the order of the day. History suggests that unions are justified in being secretive in their organizing campaigns. There are many fair and progressive employers in this province. Unfortunately, and while I do not suggest that Alcan is one of these, there are also employers which are neither, and, more importantly, there are employers which are either unaware of or knowingly disregard the rights of employees and trade unions under the Act. Anyone who thinks otherwise is out of touch with reality. Even a cursory review of the Board’s jurisprudence since 1956 will reveal numerous examples of improper, sometimes egregious, conduct by employers against employees who the employer discovered or even suspected had the temerity to exercise or seek to exercise their rights under the *Labour Relations Act* of the day. Indeed, some employers display an almost allergic reaction to the mere suggestion that their employees may seek to be represented by a trade union. Consequently, it is not at all surprising that when asked by

an employer a trade union would opt to deny that it intended to apply for certification, in order to protect the employees, even though that is precisely what trade unions do.

85. Further, one might well ask what Alcan would have done if it had not received the assurance which it sought. Would the employer have terminated the employment of the U.A. members it had already hired or refused to hire any other U.A. members, because they were members of the U.A. or because it feared an application for certification? A law-abiding employer would not do any such thing, because such conduct would be a clear violation of at least sections 72 and 76, and probably of section 70 of the Act. An employer need not be happy about the prospect of having to bargain with a trade union as the representative of its employees. Indeed, it is entitled to be unhappy about it. But no employer is entitled to interfere with the rights of employees to join, or to decline to join, a trade union, or with the right of employees to support a trade union's application to be certified as their collective bargaining agent. While there are some limits on this freedom, none of them have anything to do with employers or employers' rights, and it remains the most fundamental right under the Act. There is nothing which is more invidious, or which will be more swiftly and sharply denounced, than an interference with this right by conduct which affects the employment of employees who seek to exercise it.

86. In these circumstances, there was no representation by the U.A. upon which Alcan was entitled to rely.

87. It is also difficult to see how the U.A. gained any "unfair" advantage as alleged by Alcan. Indeed, I see none.

88. Nor do I perceive any prejudice, in the estoppel or any other legal sense of the term, which Alcan has suffered. Does the fact that its employees and the U.A. have chosen to exercise their rights under the *Labour Relations Act, 1995*, constitute a prejudice to Alcan? I think not; any more than an exercise by Alcan of its legal rights could constitute a prejudice to its employees or the U.A. Alcan will undoubtedly be affected if the U.A.'s application for certification is successful. It will no longer have the same freedom to choose who will do some of the construction work as it has to date, and it will no longer be entitled to deal directly with some of its construction employees. To the extent that this constitutes a "prejudice", and I respectfully suggest that it does not, it is a "prejudice" which is created by the Act, not by any representation or conduct by the U.A.

89. In conjunction with its estoppel argument, Alcan made several other assertions. It asserted that the U.A. has violated the Act, that it would be contrary to public policy and the public interest for the Board to decline to inquire further into its allegations, both generally and because doing so would send the message that trade unions can do whatever they wish without fear that their conduct might be scrutinized by the Board or have negative consequences, and rhetorically asks whether in the circumstances the Board can be confident that the representation vote which has been held truly reflects the wishes of the employees, apparently a reference to employees other than those in the bargaining unit at the time the application was made. Finally, counsel seemed to suggest that if Alcan was not allowed to proceed with its allegations it might bring a separate application under section 11(2) of the Act. With respect, there is no merit to any of this.

90. When Alcan alleges that the U.A. has violated the Act, it does not point to any unfair labour practice provisions in the Act. Instead, it points to section 2, the purpose provision, subsection 11(2), a provision which specifies when the Board may dismiss an application for certification whether or not a representation vote has been taken, and if there has been one taken regardless of the results of that vote, and section 64, which provides that:

64. (1) If a trade union has obtained a certificate by fraud, the Board may at any time declare that the trade union no longer represents the employees in the bargaining unit and, upon the making of such a declaration, the trade union is not entitled to claim any rights or privileges flowing from certification and, if it has made a collective agreement binding upon the employees in the bargaining unit, the collective agreement is void.

(2) Subsection 8(9) does not apply with respect to an application for a declaration under subsection (1).

(3) If an applicant has obtained a declaration under section 63 by fraud, the Board may at any time rescind the declaration. If the declaration is rescinded, the trade union is restored as the bargaining agent for the employees in the bargaining unit and any collective agreement that, but for the declaration, would have applied with respect to the employees becomes binding as if the declaration had not been made.

(4) Subsection 63(13) does not apply with respect to an application for the rescission under subsection (3) of a declaration.

91. Section 2 is neither an unfair labour practice provision, nor a provision which can be breached as such. It is a provision which guides and assists the Board in administering and interpreting the Act. Subsection 11(2) is not a provision which can be breached either. It is a procedural vehicle, much like sections 7, 8, 49, 63, 66, 96, 99 and others, which permits an interested person, including of course an employer, to make allegations that a trade union, counsel of trade unions or person acting on their behalf has contravened the Act in a manner such that a representation vote in an application for certification should not be held or given effect to and the application should be dismissed. Neither of these provisions can either be “violated” in the sense alleged, or in and of themselves otherwise form the basis for dismissing an application for certification. For example, the Board cannot, and would not, dismiss an application for certification on the basis that if the trade union succeeds it will result in reduced flexibility or reduced employee involvement in the workplace, or will discourage direct communications between employers and employees in the workplace (both of which are a natural consequence of unionization).

92. Nor did the kind of representation which Alcan alleges the U.A. made in this case constitutes a “fraud”, either generally or within the meaning of section 64 of the Act. In its ordinary meaning, “fraud” is the use of a false representation to gain an unjust advantage, or making a false representation for the purpose of inducing another to act upon it and thereby part with something of value or surrender a legal right (which I observe gives it an estoppel-like quality). What thing of value or legal right did Alcan surrender as a result of the assurance it alleges it received from the U.A.? It has suggested none, and, for the reasons given from my conclusions with respect to Alcan’s estoppel argument, I see none.

93. Further, on its face, section 64 applies *after* a certificate has been granted. Although it was not argued, I have considered whether Alcan’s allegations make out the kind of fraud which the Board has been concerned about prior to issuing a certificate. Historically, this kind of fraud has consisted of the filing by a trade union of false or misleading membership evidence or materials in support thereof (and has generally been referred to as “fraud on the Board”), or of a trade union making representations to employees which raises a doubt regarding whether the membership evidence filed by the trade union represents a true expression of the wishes of the employees. Alcan’s allegations do not raise an issue of fraud on the Board. Assuming that there is still room for the “misrepresentation to employees” kind of fraud under the current Act (which has replaced the primarily card based representation scheme which existed previously under which the remedy generally given for such fraud was a representation vote, with a vote based representation scheme where there is a “vote in every case”), there is no suggestion of any fraud on the employees in this case.

94. Nor is there any reason to think that declining to inquire further into Alcan's allegations will signal to trade unions that they can do whatever they wish without fear of any consequences. The fact is that there is nothing in Alcan's allegations which merits further inquiry, and the Board's jurisprudence, old and new, demonstrates the Board's willingness to inquire into and deal appropriately with trade union misconduct with respect to an application for certification (see, for example, *Gruyich Services Inc.*, [1986] OLRB Rep. Aug. 1092; *Can-eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444; *Centro-Mechanical Inc.*, [1996] OLRB Rep. Sept./Oct. 762 (a case involving the same U.A. Local 221 in which an application for certification was dismissed under section 11(2) because of the trade union's misconduct); *The Masonry Contractors Ontario, Greater Ontario Area*, [1996] OLRB Rep. Nov./Dec. 951).

95. Alcan has suggested no reason to doubt that the result of the representation vote taken in the U.A.'s application in Board File No. 2743-96-R represents the true wishes of the employees. Further, as recently reviewed and described in *Ken Anderson Electric Inc.*, [1996] OLRB Rep. Sept./Oct. 846 (especially at paragraphs 17 to 35) the only employees who are entitled to cast ballots in a representation vote in an application for certification in the construction industry are the employees at work in the bargaining unit at the time the application is filed; that is, on the date the application is made.

96. Finally, there is nothing to prevent Alcan from filing an application under section 11(2) of the Act. Whether or not the Board will inquire into it is another matter, however. To the extent that Alcan may make the same allegations as it has herein, there will be no more merit to them than now merely because they are raised through a different vehicle. To the extent that Alcan may wish to make new or additional allegations, it would do well to consider the Board's decision in *Elitrex Plumbing Ltd.*, (Board File Nos. 2358-96-R and 2695-96-U, January 31, 1997, unreported). In that case, U.A. Local 46 alleged that the representation vote taken in its application for certification in that case "did not likely reflect the true wishes of the employees ..." and requested that it be certified under section 11 of the Act. The "particulars" upon which the union sought to rely on that respect included allegations contained in a letter dated 24 days after the last day for making representations and 35 days after the vote was held. The Board dismissed the union's complaint because its "additional particulars" were untimely, and its timely allegations did not make out a *prima facie* case for section 11 relief as follows:

7. The Board has always considered it appropriate to deal with applications for certification as expeditiously as possible. The maxim "labour relations delayed are labour relations defeated and denied" is particularly applicable to the vast majority of such applications. The current Act contemplates a particularly speedy process. Wherever possible, representation votes, now mandatory in every application for certification, are to be held within five days after the day on which the application for certification is filed with the Board. The Board has constructed a process which has resulted in most votes being held within this five day period, and which enables the Board to announce the results of the vote and make a final determination of an application for certification within a short time after the vote is held. The certification process requires that a party which wishes to challenge the voting process or to assert that the result of a vote does not likely reflect the true wishes of the employees in the bargaining unit, do so in a timely manner within the time fixed therefore, or as soon as practicable thereafter if it cannot meet those time limits. A party which seeks to challenge the results of a vote, after the time established for making representations in that respect has expired bears the onus providing an explanation for its delay sufficient to satisfy the Board that that party exercised reasonable diligence in making the allegations and that it is appropriate to consider the allegations on their merits.

8. In this case, the application for certification was made on November 6, 1996. In its November 13, 1996 decision, the Board ordered that the mandatory representation vote be held on November 15, 1996 (which was the sixth day, excluding Saturdays, Sundays and holidays, after the day on which the application was filed). In that decision, the Board also ordered that anyone who wished to make representations concerning any issue relating to the application for certification file a fully particularized statement of representations in that respect within seven days (again excluding

Saturdays, Sundays and holidays in which the Board is closed) of the date on which the vote was taken; that is by November 26, 1996.

9. The vote was held as directed on November 15, 1996. As we have already pointed out, the parties signed the standard certification regarding the conduct of the vote. Also on that same day, the usual Form T-40, Notice regarding the vote, which once again reminded everyone that anyone who had any representations to make with respect to anything arising out of the application for certification was required to make those representations by November 26, 1996, and specifying that no one would be allowed to present evidence or make representations about anything which had not been filed "promptly in the way required by the Board's Rules of Procedure" except with leave of the Board, was provided to the parties, and was also to be posted by the employer.

10. On November 26, 1996, the applicant filed representations concerning the conduct of the vote in the form of the section 96 complaint herein. In these representations, the applicant essentially alleged that the employer had given the employees in the bargaining unit what it described as an "intimidating" letter (notwithstanding that the applicant apparently had not seen a copy of this letter) and that an individual whom it alleges owned shares in the employer and is "part of management" made improper comments to a bargaining unit employee, and that as a result the vote did not likely reflect the true wishes of the employees.

11. The current Act provides, as the Act has long provided, that an employer is free to express its views so long as it does not use "coercion, intimidation, threats, promises or undue influence." The letter complained of was produced by the employer as part of its response.

12. This is an application for certification in the construction industry, and what (allegedly) occurred must be viewed in that context, and not in the context of some non-existent labour relations laboratory in which employees can be shielded from all influences. The Act does not require employers to want trade unions in their workplaces. It does not even require that they remain neutral about such possibility. In this case, we were satisfied that there was nothing in either the letter or in the alleged comments which cross the line which separates an acceptable expression of the employer's views from "coercion, intimidation, threats, promises or undue influence" which is prohibited by the Act. That is, the applicant's allegations in the section 96 complaint did not make out a *prima facie* case for doubting the reliability of the November 15, 1996 representation vote or the relief sought by the applicant in that respect.

13. Further, we did not consider it appropriate to give the applicant leave to rely on the allegations in its December 20, 1996 letter. The applicant offered no real explanation for its failure to file those allegations, all of which relate to the time period between the certification application date and the vote date, in a timely way. The applicant's "explanation" was that it didn't make the allegations earlier because it didn't know about them. It is not apparent that the applicant made *any* enquires or other investigation in that respect, either among what it considered to be its supporters in the bargaining unit or otherwise. In short, the applicant gave no cogent reason for failing to make the allegations earlier, and we were satisfied that there was no basis upon which the Board could properly exercise its discretion to extend the time limits in that respect and thereby permit the applicant to rely on its untimely allegations.

97. In conclusion, the Board is satisfied that there is no cogent reason to inquire into Alcan's allegations, and that the U.A.'s motion should be allowed. Alcan's allegations are therefore dismissed.

VI

The Result

98. In the result, having regard to the Board's determinations as aforesaid, and the results of the representation votes taken; namely, that in each of these applications more than 50 per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant trade union, and having regard to the provisions of section 160(1) of the Act:

(a) Board File No. 2736-96-R

(i) a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the Millwright District Council of Ontario of the United Brotherhood of Carpenters and Joiners of America and the United Brotherhood of Carpenters and Joiners of America in respect of all millwrights and millwrights' apprentices in the employ of Alcan Aluminium Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except millwrights and millwrights' apprentices employed under the United Steelworkers of America, Local 8754 collective agreement at the Alcan Foil Products Plant in the Municipality of Metropolitan Toronto, millwrights and millwrights' apprentices employed under the United Steelworkers of America, Local 7949 collective agreement at the Alcan Cable Plant in Bracebridge, and millwrights and millwrights' apprentices employed under the International Association of Machinists and Aerospace Workers Lodge 54 collective agreement at the Alcan Rolled Products Company Plant in Kingston, save and except non-working foremen and persons above the rank of non-working foreman;

(ii) further, and also pursuant to section 160(1) of the Act, a certificate will issue to the applicant in respect of all millwrights and millwrights' apprentices in all other sectors of the construction industry; that is, excluding the industrial, commercial and institutional sector, in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman;

(iii) the Registrar is directed to destroy the ballots cast in the representation vote taken in this application following the expiration of 30 days from the date hereof, unless a fully particularized statement requesting that the ballots not be destroyed is received by the Board from one of the parties before that 30-day period expires.

(b) Board File No. 2743-96-R

(i) a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada in respect of all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Alcan Aluminium Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices employed under the International Association of Machinists and Aerospace Workers Lodge 54 collective agreement at Alcan Rolled

Products Company Plant in Kingston, save and except non-working foremen and persons above the rank of non-working foreman;

(ii) further, and also pursuant to section 160(1) of the Act, a certificate will issue to the applicant in respect of all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Alcan Aluminium Limited in all other sectors of the construction industry; that is, excluding the industrial, commercial and institutional sector, in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman;

(iii) the Registrar is directed to destroy the ballots cast in the representation vote taken in this application following the expiration of 30 days from the date hereof, unless a fully particularized statement requesting that the ballots not be destroyed is received by the Board within that 30-day period.

99. Alcan Aluminium Limited is directed to post copies of this decision immediately, adjacent to the "Notice to Employees of Application and of Vote" posted previously. This decision must remain posted for a period of 30 days.

1709-96-U Bellwoods Centre for Community Living Inc., Applicant v. Service Employees International Union, Local 204, Responding Party

Hospital Labour Disputes Arbitration Act - Reference - Board not accepting submission that Board ought not to answer question posed in Minister's reference on grounds of res judicata or issue estoppel or abuse of process - Employer providing "independent living" services to physically disabled adults living in three housing projects - Employer also offering outreach services to clients living in their own homes - Board finding employer to be a "hospital" within meaning of Hospital Labour Disputes Arbitration Act

BEFORE: *S. Liang*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

DECISION OF S. LIANG, VICE-CHAIR AND BOARD MEMBER H. PEACOCK; June 25, 1997

1. This is a proceeding in the matter of a reference to the Board pursuant to subsection 3(2) of the *Hospital Labour Disputes Arbitration Act* (HLDA), wherein the Minister of Labour has referred the following question to the Board for its advice:

"Is the Employer a "hospital" within the meaning of the *Hospital Labour Disputes Arbitration Act*?"

2. This proceeding was initiated by a request from the union, dated July 22, 1996, in which the union asked the Minister to determine whether the employer falls within the jurisdiction of the HLDA.

Introduction

3. The employer, Bellwoods Centre for Community Living Inc. ("Bellwoods") is a non-profit organization which provides services to physically disabled adults. The union, the Service Employees

International Union, Local 204 ("Local 204"), represents a bargaining unit consisting primarily of support service workers employed by Bellwoods. There are approximately 93 persons in the bargaining unit, 31 of whom work full time and 62 of whom work part time. There are, coincidentally, about 93 clients who receive services from Bellwoods, 36 of whom live in their own private homes and 57 of whom live in one of three housing projects operated by Bellwoods.

4. The services provided by Bellwoods through its staff consist primarily of assistance in carrying out basic daily activities such as getting in and out of bed, dressing, personal hygiene routines, bowel and bladder routines, preparation and consumption of food, and housekeeping. The level of assistance required by clients of Bellwoods varies greatly, according to the level and type of physical disability. The services provided by Bellwoods are intended to enable its clients to live as independently as possible in the community. There are no fees for any of the services provided by Bellwoods. Bellwoods is funded by the Ministry of Health, through Long Term Care funds.

5. The union and the employer have been in a collective bargaining relationship for some time. In or about 1987, the union sought a determination from the then Minister of Labour as to whether or not Bellwoods was a hospital for the purposes of the HLDAA. Written submissions were presented to the Minister by the parties, and by decision dated March 28, 1988, the Minister dismissed the union's application.

6. In 1992, the union once again sought a determination of the same issue to the Minister, relying on a decision of the Divisional Court (*Dignicare Incorporated*, unreported, February 12, 1991), to justify its request for reconsideration of the matter. The employer opposed the application, taking the position that the Minister ought not to retry the issue which had already been decided. The Minister of Labour informed the parties in response that he was "not persuaded that re-consideration of the question as to the applicability of the HLDAA to the bargaining relationship of the parties is appropriate at this time."

7. On February 6, 1996, the Union once again made a request that the Minister exercise her authority to determine that the employer was a hospital within the meaning of the HLDAA. By letter dated February 9, the employer responded by objecting to the request, on the basis that the matter had already been decided twice by the Minister. The employer asked that the matter be dismissed. On February 27, 1996, the Minister's delegate advised the parties that since the conciliation process had not been exhausted by the parties, the request by the union was premature. On July 22, 1996, the union reiterated its request after attending a conciliation meeting. Once again, the employer raised the same objections, in a letter dated August 9. On September 10, the Minister's delegate referred the question set out above to the Board, attaching only the request from the union dated July 22 and the request for the appointment of a conciliation officer.

8. On September 18, 1996, the employer sent the Minister's delegate further submissions and attachments documenting the previous applications to the Minister in 1988 and 1992. The employer submitted that it would amount to an abuse of process to require Bellwoods to litigate the issue for a third time. These submissions and materials were sent to the Board as an Addendum to the Ministerial Reference dated September 10.

9. We have set out these events in detail because the employer has submitted that the Board ought not to answer the question of whether it is a hospital within the meaning of the HLDAA. In its brief, it has submitted that the union's application ought to be dismissed as there have been no relevant legislative or factual changes in the period between the Ministers' previous decisions and the present. In final argument, the employer expanded on its position, asserting that the Board ought not to answer the question on the merits because of the application of *res judicata*, or abuse of process. The employer submitted in the alternative that the union should not succeed on the application where it has not shown

any changes to the facts or legislative background, and (apparently) in the further alternative, asked the Board to find that the Minister was *functus officio* after the decision in 1988. The employer requested that the Board either dismiss the application because of its arguments, or advise the Minister accordingly.

10. The above “process” arguments (i.e. *res judicata* and the related arguments) were raised for the first time during final argument. The union did not object to the arguments being raised in this manner, addressing them on their substance. In our view, they are the sorts of issues which should have been canvassed at the beginning of the hearing. If there had been any merit to the employer’s positions, the evidence which this panel heard over the course of a number of days would have been entirely unnecessary. It might further have influenced the manner in which the panel decided to deal with this reference. Having considered these submissions once made, however, we have determined that the Board must and ought simply to answer the question which has been put, that is, whether Bellwoods is a hospital within the meaning of the HLDAA.

11. We arrive at this conclusion after considering the statutory context of the Board’s role in this reference, and the Board’s duties within that context. The relevant provisions of the HLDAA are as follows:

Sec. 1. (1) In this Act,

“hospital” means any hospital, sanitarium, sanatorium, nursing home or other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease, or injury or for the observation, care, or treatment of convalescent or chronically ill persons, whether or not it is granted aid out of moneys appropriated by the Legislature and whether or not it is operated for private gain, and includes a home for the aged;

“hospital employee” means a person employed in the operation of a hospital;

“Minister” means the Minister of Labour;

“party” means the trade union that is the bargaining agent for the bargaining unit of hospital employees, on the one hand, or the employers of such employees, on the other hand, and “parties” means the two of them.

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Sec. 3. (1) Where a conciliation officer appointed under section 16 of the *Labour Relations Act* is unable to effect a collective agreement within the time allowed under section 18 of that Act, the Minister shall forthwith by notice in writing inform each of the parties that the conciliation officer has been unable to effect a collective agreement, and sections 17 and 19 of the *Labour Relations Act* shall not apply.

(2) The Minister may refer to the Ontario Labour Relations Board any question which in his or her opinion relates to the exercise of his or her power under subsection (1) and the Board shall report its decision on the question.

12. The notable elements of the above statutory scheme for the purposes of the present arguments are as follows. The Minister has a power given by these provisions to determine whether the mechanisms of the HLDAA or the mechanisms of the *Labour Relations Act, 1995* apply to the resolution of collective bargaining disputes for an employer and its employees. The Minister *may*, but does not have to, refer to the Board any question which in his or her opinion relates to the exercise of his or her power to make that determination. The Minister has a discretion as to the scope of any question referred to the Board. Once a question has been referred, the Board has a duty to provide an answer. The Board’s role is thus slightly different than in most other matters before it. The Board answers to the *Minister* and not strictly speaking to the parties in a proceeding under s. 3(2) of the HLDAA. Furthermore, the

Board's answer is not a final determination on the issue; it is for the Minister to decide what weight to give the Board's advice.

13. In the case before us, the employer wishes to raise issues which do not relate to the merits of the question of whether it is a hospital within the meaning of the HLDAA. The employer's argument, whether it is characterized as *res judicata*, issue estoppel, abuse of process or *functus officio*, is essentially that this matter *should not be revisited*. This was an argument which the employer made in response to the union's application for a HLDAA determination, in its letters of February 9 and August 9. This is also an argument which was made in more detail in the employer's correspondence of September 18, after the matter was referred to the Board. The issue of whether or not the Minister ought to reconsider her predecessor's earlier decisions had therefore been raised by the employer prior to this reference. Despite this, the Minister has referred the above question to the Board for its advice, and has not sought the Board's advice on whether there is any impediment to the relitigation of this very question.

14. It is also of significance that in a previous application by the union in 1992, the Minister accepted the employer's argument that he should not re-consider the issue of the applicability of the HLDAA.

15. Given this background, the Board's statutory role and the question referred to it, the Board concludes that it is not within the scope of the question to answer the "process" issues (as the parties have put it) raised by the employer. They are matters properly before the Minister. To the extent that there is an issue raised as to whether the union's request should be entertained on its merits, it is for the Minister to decide and the Minister has not referred a question to the Board for advice on this aspect of the matter. We are supported in our conclusion by the comments of the Board in *Surex Community Services*, [1994] OLRB Rep. Oct. 1430 (para. 13) and *George Jeffrey Children's Treatment Centre*, [1994] OLRB Rep. Dec. 1656 (para. 30).

16. Finally, whether or not the Board can or should adopt a "changes only" approach to these matters where there has been a previous Ministerial determination, the Board is not inclined to give much weight to the Minister's decision in 1988 in this case, for reasons given below.

17. We therefore turn to a consideration of the question before us.

18. Bellwoods has existed since the 1950's, providing services to physically disabled adults. The current model of service was first established in 1983, with the renovation and opening of residential facilities on Shaw St. and Church St. in Toronto. The Executive Director of Bellwoods described how in that year, Bellwoods went from a "medical" model of providing services, to an "independent living" model. The independent living movement arose during the 1970's as a movement of disabled persons who were dissatisfied with the prevailing model of institutional care. Many of these persons felt left out of the direction of their care and futures. The application of this movement to a service-provision model means that the goal of services to the disabled is to establish the supports that enable the disabled to live as independently as possible in the community.

19. At Bellwoods, this is accomplished by providing services to clients in a variety of living situations. At present, there are approximately 57 clients living at three housing projects, commonly referred to as Shaw St., Church St., and Mimico. There are also approximately 36 clients who receive services from Bellwoods' outreach service in their own homes.

20. Clients living at one of the three housing projects sign a Support Service Agreement and Individual Service Plan which outline the services provided by Bellwoods as well as the responsibilities of clients. In the Support Service Agreement, it is provided:

2. SUPPORT SERVICES

It is the intention of Bellwoods and the Client that Support Services will be provided, to the extent that Bellwoods can reasonably do so, in support of *independent living*, which is the concept of providing choice and opportunity for clients to direct as best they can the activities of everyday living.

In this Agreement, “**Support Services**” means assistance with the activities of daily living which the Client is unable to perform independently because of his or her physical disability, and includes whenever applicable, assistance with the following functions:

- (a) personal grooming and hygiene;
- (b) bathing and washing;
- (c) mobility, including assistance with wheelchairs, climbing stairs, walking and transferring;
- (d) dressing and undressing;
- (e) skin care;
- (f) toileting;
- (g) ventilation and tracheotomy assistance, but only if the Client provides instructions to Bellwoods Staff which in Bellwoods’ opinion, acting reasonably, are sufficient to enable Bellwoods Staff to safely provide such assistance;
- (h) meal preparation and meal clean up;
- (i) eating and drinking;
- (j) essential communication, including writing and telephone use; and
- (k) housekeeping.

Support Services may also include the following services, to the extent that they can be provided in the sole discretion of Bellwoods:

- (aa) grocery and personal shopping [NOTE: this service is not provided at Mimico Apartment Project];
- (bb) banking and budgeting [NOTE: this service is not provided at Mimico Apartment Project];
- (cc) escorting the Clients on essential appointments and errands [NOTE: this service is not provided at Mimico Apartment Project]. Bellwoods staff will not perform other errands for the Client; and
- (dd) other types of informal living training or support as defined individually.

Support Services do not include any medical services or professional nursing care. Support Services will be provided by Bellwoods only if and when (i) the Client can responsibly and safely be left unattended when Bellwoods Staff are not providing Support Services to the Client, and (ii) the Client is capable of fulfilling his or her responsibilities under this Agreement.

21. In general, it is the responsibility of Bellwoods to provide the support services and the responsibility of the client to work towards independence and self-direction and to direct his or own care in support of that.

22. The client and Bellwoods also prepare an Individual Service Plan which provides a detailed summary of the services provided to that client, the frequency of provision of that service, and the estimated time required for each service.

23. At Shaw St., clients also sign a lease with Bellwoods, since Bellwoods owns the premises. At Church St., Bellwoods holds a head lease with the Metro Toronto Housing Authority, and sublets to its clients. The Bellwoods facility at Mimico is part of a co-operative housing project. The co-operative reserves a certain number of spaces for Bellwoods clients. Upon establishing a relationship for services with Bellwoods, clients become members of and are provided housing in the co-operative.

24. The Shaw St. housing project consists of 32 self-contained apartment units in which 33 individuals reside (one apartment is occupied by a married couple). Each apartment contains private living quarters including a bathroom and complete kitchen. There are certain features of the physical space which reflect the nature of the tenants. The apartments are designed to be handicapped-accessible, with such features as roll-in showers, lower counters, and angled mirrors. Each apartment is equipped with call bells in bedroom and bathroom. The doors to the apartment have remote control door openers which do not require a key.

25. Bellwoods maintains an office in the Shaw St. housing complex, which is staffed 24 hours per day. Support service workers work on a day shift, afternoon shift and night shift. There are between 3 to 6 support service workers on a given shift. There is also a housekeeper who works Monday to Friday, 9 a.m. to 5 p.m. The main Bellwoods administrative office is also located at the Shaw St. housing project. Working at this office are management personnel, office and clerical staff and program personnel.

26. Generally, Bellwoods staff provide services to the clients in the apartments according to a booking system. There is a booking sheet in which appointments for each client are noted. Staff enter the apartments by being let in by the client, or by the use of a master key if a client is physically unable to open a door. One client leaves his door open all the time due to his total incapacity. Pre-booked services include assistance with morning routines (getting out of bed, toileting, showering, shaving, brushing teeth, dressing etc.), nighttime routines (similar to morning routines), bowel and bladder routines (catheters, legbags, nightly drainage bags, diapers etc.), meal routines (cooking, cutting food, feeding etc.), housekeeping (laundry etc.). In addition, staff assist with such matters as suctioning (in the case of tracheotomies), bed turns, menstruation, and medication. In addition to pre-booked services, staff are sometimes called upon to assist a client who has, for instance, fallen or dropped something that he or she cannot retrieve.

27. Bellwoods staff are not medically trained. The support services provided are not generally of a medical nature, although some may be viewed as medically-related. For instance, there are certain procedures, such as those associated with intermittent catheters or the suctioning of persons with tracheotomies, in which Bellwoods staff are required to be or have been trained by medically qualified personnel. Staff help with the administration of medication, in the sense of offering clients dosages of medication which have been pre-measured by a person (such as a nurse or family member) with the authority to do so. Some clients are unable to take their own medication because of physical limitations and staff sometimes administer it.

28. The clients who live at the Shaw St. housing complex vary in disabilities and needs. Most use wheelchairs, and some use walkers or canes. Many require the use of a mechanical lift to get in and

out of bed. A few are speech-impaired and use computers or boards to communicate. One client requires very little from Bellwoods in the way of services, while others require assistance with virtually every aspect of daily living. The severity of a client's level of disability is not necessarily correlated with that person's activity in the community. Some clients who are highly disabled and require a great deal of assistance with personal routines nevertheless leave their apartments by such means as WheelTrans and participate in outside activities. Some clients rarely leave their premises; others go shopping, attend school, socialize, or work. Clients are free to come and go as they wish, at all hours. There are likewise no restrictions on visitors.

29. Bellwoods clients also make use of outside agencies from time to time, such as nursing services, WheelTrans, and Meals on Wheels. There are some clients, for instance, who receive visits from organizations such as the Victorian Order of Nurses for such services as the changing of catheters or dressings.

30. Clients are responsible for the provision, however managed, of their own groceries, furniture and personal items. There is a van operated by a Bellwoods employee two days a week, which clients sometimes use for grocery shopping or medical appointments or other outings.

31. Shaw St. also houses the Bellwoods Transitional Living Program. Fourteen of the 33 tenants of Shaw St. participate in this program. The purpose of this program is to teach life skills to clients to foster their ability to live independently. It is intended that clients who live at Shaw St. as part of this Program will be able to move out into another living arrangement within about 18 months; in reality, some may stay up to four years before suitable other arrangements are found. Clients of Bellwoods outside of the Transitional Living Program may have a much longer relationship with Bellwoods. Some have lived at a Bellwoods facility for several decades.

32. The Church St. location consists of housing for 12 clients, in three units. Each unit consists of private bedrooms and common kitchens, eating areas and bathrooms. The Bellwoods units are a part of a larger residential structure. In addition to the three units, Bellwoods has a office used by its on-site supervisor and staff, an office for its project director and a recreation room for the clients. Each unit has a lock at its main door. Each private bedroom has a lock, but they are generally kept unlocked by their residents. As with Shaw St., the units are designed to be accessible for the physically disabled.

33. As with Shaw St., Church St. is staffed by Bellwoods personnel 24 hours per day, over three shifts. There are generally two service workers present at all times. In addition, there is a housekeeper and a cook that work an average of five days per week each.

34. Of the twelve clients that live in the Church St. facility, eleven use wheelchairs, and one a walker. As with Shaw St., the level of assistance provided to each client varies. Some require minimal assistance with their daily activities. Some require a great deal of assistance with anything from transfers from bed to wheelchair, personal hygiene, toileting and meals. The level of outside activities varies amongst the residents, some having regular engagements most days of the week and others staying for the most part at home. The residents are free to come and go as they wish, however, and receive visitors as they wish. Two of the residents have difficulty in communicating, and one uses a language board.

35. The types of services provided by Bellwoods staff at Church St. are similar to those provided at the Shaw St. facility. Like the Shaw St. facility, clients receive both pre-booked services, and ad hoc services on demand. Meals are provided by the cook at Church St., and if she is not there, generally by the staff. Unlike the Shaw St. facility, staff do "night checks" of the three units, walking through common areas and glancing into open bedroom doors to ensure nothing is out of order.

36. The Mimico project consists of twelve apartments which are part of a larger co-operative housing project, housing twelve clients plus the spouse of a client. There is an office for Bellwoods staff on the premises. Bellwoods staff are on site 24 hours per day. There is at least one female and one male service worker on every shift, with additional personnel for part of each day. The apartments are like regular apartments in many ways, although they are modified for the needs of the clients. All have front door locks, with remote entry. Bellwoods has keys for all apartments and some residents permit the use of keys by staff to obtain access on a regular basis.

37. As with the other projects, staff provide services to the clients at Mimico on the basis of a booking system. In addition, staff will provide services to clients upon request and as needed. Clients can contact staff by phone, or by pager. Some of the phones are specially equipped, for instance, to be voice activated.

38. The services provided are similar to those at Shaw St. and Church St., and vary with the disabilities and needs of the clients. Most clients need assistance with morning and night routines. For about half the clients, mealtime assistance is required which involves daily assistance with the preparation and sometimes eating of meals. For other clients, assistance may only be required occasionally, or with cleaning up dishes. For the clients that require the greatest level of services, staff may spend up to an hour and half on a morning routine, including rising, dressing, showering and breakfast.

39. Some clients engage in activities out of the building, such as school or volunteer activities, and use WheelTrans and occasionally the Bellwoods van for transportation. One resident has his own van.

40. In addition to providing services at the three housing projects, Bellwoods also has an outreach component, in which services are provided to clients in their own homes. There are approximately 36 clients who receive services in this way, and about 25 part-time staff engaged in this part of Bellwoods' work. Clients sign Support Service Agreements and Individual Service Plans which are similar to the ones signed by clients in the housing projects. The services provided are substantially similar to those provided at the housing projects, though not as extensive. Most clients receive daily assistance with morning and evening routines which might include getting in and out of bed, toileting (which might involve either transfers to and from a toilet or catheters or urine bags), showering, changing and meals. Staff do not, however, assist clients in the outreach program with housekeeping chores, nor with grocery shopping, banking or escorting them to appointments. All services are pre-booked, and are provided between 6 a.m. and midnight.

41. As with the rest of the Bellwoods clients, the level of disability of the clients in the outreach program varies and the level of involvement in the community varies. Some of the outreach clients are active in the community despite requiring assistance with many aspects of daily life, attending school, working at home by computer, and taking part in volunteer activities.

42. Some outreach clients also receive nursing services from such organization as the Victorian Order of Nurses, or homemaker services.

43. Based on the Support Service Agreements, the Executive Director of Bellwoods estimates that clients receive an average of 2.25 hours of service per day. Some of the evidence from the support service workers suggested a slightly higher average, which may reflect the addition of unscheduled services. It is reasonable to conclude that clients that require a high level of care receive about 3 to 4 hours of services per day, a few clients receive very little daily care, and the majority fall in between with the average between 2 to 3 hours per day.

44. The services provided by Bellwoods are regulated by the *Long Term Care Act, 1994*, S.O.1994, c.26. One of the purposes of this Act is to “ensure that a wide range of community services is available to people in their own homes and in other community settings so that alternatives to institutional care exist” [s.1(a)]. As an approved agency under this Act, Bellwoods receives a grant for the purpose of allowing it to provide services.

45. The Executive Director of Bellwoods testified about a group called the Provincial Association of Senior Managers (PASM), which is a voluntary support group of executive directors of similar organizations around the province. There are about 33 organizations in this group, which meet to share concerns and ideas about the work of these organizations. The common link between the organizations is that they provide services on a non-profit basis primarily to the physically disabled and receive funding under the *Long Term Care Act, 1994*. Thirty-one of the 33 organizations provide support services like those provided by Bellwoods while two are sheltered workshops. About half of these organizations are unionized. Of the ones which are unionized, three (not including Bellwoods) have been the subject of HLDAA determinations by a Minister of Labour. The Minister found two to be covered by HLDAA, and the other not.

46. There are many other organizations in Ontario, at least 100 and perhaps more, which receive Long Term Care funding to provide services to the physically disabled but which are not part of PASM. In addition, there are a number of commercial agencies which provide support services for a fee to the physically disabled. Bellwoods from time to time engages the services of these agencies, and has stated its intention to do so in the event of a strike by its staff.

47. Counsel for the union submitted that Bellwoods is an “other institution” within the meaning of section 1(1)(a) of the HLDAA, “operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury”. The employer does not dispute that Bellwoods is operated for the observation, care or treatment of persons afflicted with or suffering from a physical illness, disease or injury, as that phrase has been applied by the Board. The employer does take issue with the characterization of Bellwoods as an “institution”.

48. Counsel for the union submitted that as an operator of residential facilities whose purpose is the provision of services to the physically disabled, Bellwoods is an institution. The persons living at the housing projects have much more than a landlord-tenant relationship with Bellwoods. They are resident at these projects precisely because they require the services Bellwoods offers. Their living arrangements share many characteristics with private homes, but fundamentally, the purpose of the living arrangements is the provision of services.

49. With respect to the outreach program, counsel submitted that whether or not services are provided through a residential facility or in clients’ own homes is a factor to consider in determining whether an employer is an institution covered by the HLDAA, but not the only factor. Furthermore, the Board has, in *George Jeffrey Children’s Treatment Centre*, [1994] OLRB Rep. Dec. 1656, found that an employer which had a significant outreach component similar to that at Bellwoods, was nevertheless an institution covered by the HLDAA.

50. Counsel submitted that the decision in *CUPE, Local 2542 v. Dignicare Inc.* (February 12, 1991) unreported decision of the Ontario Divisional Court, establishes that an employer need not be similar in nature to a hospital, sanitarium, sanatorium or nursing home to be found an “other institution” within the meaning of the HLDAA. It is submitted that the Board’s cases likewise reject the argument that the meaning of “other institution” must be governed by the list of specific institutions found in

section 1(1)(a) of that Act: see *Surex Community Services v. OPSEU, Local 5102*, [1994] OLRB Rep. Oct. 1430, and *George Jeffrey, supra*.

51. Fundamentally, it was submitted, the Board in applying the HLDAA must be concerned to protect those whose health and safety would be jeopardized by a withdrawal of services in the event of a labour dispute. The Board must interpret its provisions in this light. An employer may be found to be a “hospital” for the purposes of HLDAA and for no other purpose. Further, to the extent that the employer makes an argument based on the stigma associated with the term “institution”, the HLDAA is only a piece of labour legislation. There is no reason why a finding that Bellwoods is an institution which is a hospital for the purposes of the HLDAA should have any impact on the philosophy of independent living according to which it provides its services.

52. Counsel for the employer submitted that the issue which the Board must decide in determining whether Bellwoods is covered by the HLDAA is whether the health and safety of its clients would be jeopardized by a withdrawal of services. This requires the Board to assess the relative dependency of those clients on Bellwoods. There is no question that there would be some detriment to those clients from a withdrawal of services; this, however, is not enough. The Board must find that the level of dependency is so great, and the alternatives in the event of a strike or lockout so unsatisfactory, that the health and safety of the clients would be put in jeopardy by a strike or lockout.

53. Counsel analyzed the facts of this case in the context of the eight factors enumerated in *The Canadian Red Cross Society v. SEIU, Local 204*, [1995] OLRB Rep. May 612. It was submitted that those eight factors lead to a finding that Bellwoods is not a “hospital” within the meaning of the HLDAA.

54. Further, counsel urged the Board not to follow *North Yorkers for Disabled Persons Inc.*, [1995] OLRB Rep. July 1001, on the basis that it is distinguishable, and on the basis that the reasoning in that case has been placed in doubt by subsequent Board decisions. Counsel likewise distinguishes *George Jeffrey Children’s Treatment Centre* and *Surex Community Services, supra*.

55. Counsel accepts that the reasons in *Dignicare Inc., supra* mean that the Board is not obliged to find that medical care is provided, in order to support a finding that an employer is a “hospital” within the meaning of the HLDAA. However, it is asserted, the Board is still obliged to consider the meaning of “other institution” in section 1(1)(a) of that Act within the context of the enumerated facilities: hospitals, sanatoria, sanatoria, nursing homes. Whatever may be an “other institution”, it must share essential characteristics with these enumerated facilities. Further, the Board is obliged to consider the meaning of “other institution” within the context of other statutes that relate to the same subject matter. The institutions regulated by hospital legislation share certain characteristics none of which relate to the functions performed by Bellwoods. Also, it is significant that the very legislation which *does* regulate the services provided by Bellwoods states that its purpose is to provide *alternatives* to institutional care [ie. the *Long Term Care Act, 1994, supra*].

56. Counsel submits that it is unrealistic to think that a finding that a facility is covered by the HLDAA will have no impact on the manner in which care is provided. This is an environment where the philosophy for the provision of services is paramount. It should be critical to the Board’s determinations that the clients of Bellwoods are able to and are expected to direct their own care. This relates to the issue of dependency, one of the eight enumerated factors in *Red Cross, supra*. This alone distinguishes Bellwoods from the enumerated institutions in section 1(1)(a) of the HLDAA.

57. Other cases relied upon or referred to in argument were: *CUPE, Local 3101 v. Maison Mère des Soeurs de la Charité d’Ottawa*, [1995] OLRB Rep. July 978; *Meadowcroft Holdings Inc. v. LDSW, Local 220*, [1997] OLRB Rep. Jan./Feb. 74.

58. In determining whether this employer is an “other institution” within the meaning of section 1(1)(a) of the HLDAA, and therefore a hospital within the meaning of that Act, the Board finds it useful to begin with the analysis of the Divisional Court in *Dignicare Inc.*, *supra*. In that decision, the Court quoted from the decision of the Minister in *Re Bruce Retirement Villa and Service Employees Union, Local 210*, in which it was stated:

“The purpose of the *Hospital Labour Disputes Arbitration Act* is to ensure that persons who are afflicted with physical or mental disabilities are not left without care in the event of a strike or lockout.”

The Court also referred to the decision of the Minister in *Re Versa - Care of Hanover*, in which it was stated:

“The Act is intended to protect those who may not adequately be able to protect themselves if services provided by the Lodge were unavailable. If the health and safety of residents is dependent on services offered by the Lodge, their health and safety could be jeopardized by a strike or lockout. In these circumstances, the HLDAA provides that employees cannot strike or be locked out. Instead, the parties must resolve their disputes by means of binding arbitration.”

59. In the course of its reasons, the Court stated:

In light of the use of the words “observation, care or treatment” in the statute, the Ministers erred in determining that an institution would fall within the definition of “hospital” in the Act only if the care, observation or treatment provided by the institution was of a medical nature *and* only if the institution was similar in nature to a hospital, sanatorium, sanitarium, or nursing home.

[emphasis added]

60. The Board takes from the above the following: the purpose of the HLDAA is to protect persons who have special needs as a result of physical or mental conditions from a withdrawal of services associated with a strike or lockout. There is no reason to limit the types of services to which the HLDAA is directed to medical services; other types of “observation, care and treatment” may be so fundamental to the well-being of these persons that they ought to be maintained.

61. As is evident from the above, in making a determination under the HLDAA, the Board focuses on the nature of the *services* provided by the employer: see *Extendicare Diagnostic Services*, [1982] OLRB Rep. Mar. 371, cited in *Red Cross*, *supra*. However, it is not sufficient that an employer provides services which can be termed as “observation, care and treatment” of those with a physical or mental condition (as was acknowledged by the employer here). The Act requires a finding that these services be provided by an “institution” and that the institution be “operated for” the provision of that care.

62. The Board finds it useful in deciding whether Bellwoods is an “other institution” within the meaning of the HLDAA to refer to the list of factors identified in *Red Cross*, *supra*. They are:

- (i) the nature or kind of care provided by the institution in question;
- (ii) the degree or extent of the care;
- (iii) the extent to which the recipients depend upon the care for their continued health or safety;
- (iv) whether the institution is under a statutory obligation to provide the care;

- (v) whether the individuals providing the care are employees of the institution or a third party;
- (vi) the location at which the care is provided;
- (vii) the existence of alternatives to the provision of the care by the employees in question;
- (viii) the historical practice of collective bargaining in the industry.

63. A consideration of the above factors to this case leads the Board to find that Bellwoods is an “other institution” and therefore a “hospital” within the meaning of section 1(1)(a) of the HLDAA.

64. Since they are inter-related, the Board will consider first the relevance of factors (i) to (iii) and (vii). The nature of the services provided by Bellwoods is similar in many ways to that provided at other facilities found by the Board to be covered by the HLDAA. Most of the services received by Bellwoods clients are in the nature of “personal support”. They are not medical in nature but are directed at essential daily activities which their clients would not, because of physical disability, otherwise be able to accomplish. The services are essential in that they relate to matters of personal hygiene, nutrition, bodily functions and other activities necessary to the maintenance of personal health, well-being and (if left unprovided) safety. There is no question but that the health, well-being and safety of Bellwoods clients would be placed in jeopardy if these services were not provided. To this extent, the Board is satisfied that Bellwoods clients depend on these services for their continued health, well-being and safety.

65. The extent of the services provided, when measured in time devoted daily to their accomplishment, may well be less than that provided to a medical patient during a short stay in a hospital. However, like hospitals and other like institutions, the staff of Bellwoods are available 24 hours per day if necessary. This is in contrast to the extent of the services provided by the Homemaker Services Program under consideration in *Red Cross, supra*. In that case, the clients of the homemaker program were provided homemaking services to a maximum of 20 hours per month, with no element of “on call”.

66. It is notable that most of the clients of Bellwoods require its services on a daily basis. Along with the 24-hour staffing, this demonstrates the degree to which these services are not discretionary, in the sense that a person can “cope” with a lack of these services for a period of time. A Bellwoods client may only require an hour of assistance with a morning routine, some time at noon and another hour for a bedtime routine; the consequences of going without this assistance, however, are serious.

67. Counsel for the employer submits that the fact that clients are responsible for directing their own care is important to the notion of dependence. Certainly, an individual who is capable of directing his or her own care is more independent than one who is not. However, direction over the manner in which a service is provided does not diminish the necessity for that service at all. The reality is that the services provided by Bellwoods are necessary, and that they relate to functions which cannot, because of physical disability, be performed unassisted.

68. The existence of alternatives requires some consideration. Bellwoods offered evidence about the existence of private agencies which provide the same types of services, for a fee. It has apparently explored the possibility of such agencies replacing its entire workforce in the event of a labour withdrawal, and is satisfied that they have the capacity to do so. It does appear that the services provided by Bellwoods may also be obtained through private agencies. Whether or not this would be a satisfactory alternative in the event of a strike or lockout is another issue. Even assuming that *all* of the

services may be provided by agency staff, there is still an obvious detriment to the clients of Bellwoods in having to use replacement workers. Many of the clients of Bellwoods are long term residents, and likewise it appears that there are a number of employees who have been with Bellwoods for many years, and providing services to the same clients for many years. Some of these employees testified about the problems encountered when agency personnel are called in from time to time by Bellwoods. Without wishing to overstate these problems, it does appear that there are occasionally issues of adequate training, and certainly issues of familiarity and comfort on the part of clients with the use of agency staff. From the point of view of Bellwoods' clients, the wholesale replacement of their regular caregivers with agency staff would likely be seen as a significant disruption to their lives. Although these problems are not likely insurmountable over the longer term, it is reasonable to think that they would be obstacles to the smooth continuation of services in the event of a labour withdrawal.

69. In considering the factor of "existence of alternatives", the Board is also mindful of some of the observations in *Meadowcroft Holdings Inc.*, *supra* on this issue. The Board in that case expressed the view that the approach adopted by the HLDAA does not depend on the effect of a strike or lockout on the ability of a particular employer to continue to provide its services, using alternatives:

32. We are satisfied on the facts, the employer's submissions are more persuasive than are the union's on the question of the impact of a strike upon the services provided to the residents. In all likelihood the service to the residents would not be significantly disrupted were the employees in the union's bargaining unit to have engaged in a strike. But what is the relevance of that conclusion?

33. The employer argues that that conclusion is decisive. It submits that if the employer would be capable of maintaining its service to the residents during the course of a strike by the bargaining unit employees, then the purpose for which the HLDAA was legislated would be achieved without the necessity of a reference to arbitration. In the employer's argument, reference to arbitration arises only if the delivery of the service to residents should be disrupted by a strike or lock-out. In other words, HLDAA operates to ensure an essential service; if the essential service can be maintained without reference to interest or contract arbitration, then no such reference should be made by the Board.

34. The employer's argument appears sound from a labour relations perspective. Collective bargaining is a feature of a democratic society. The empowerment of parties to conclude their own agreements and to regulate their relationship without the interference of an agency of the state, like the Board, is a hallmark of a democratic society. Compulsory arbitration entails the interference of the state in free collective bargaining and that interference is customarily accepted as being legitimate only if a greater interest is to be served than the entitlement to free collective bargaining. Where the protection of life and health is put in jeopardy by the free exercise of collective bargaining and of the parties' respective rights to strike and lock-out, then the law conventionally interferes by requiring the parties to make use of compulsory arbitration as the means of concluding their collective agreement. The rights to life and health trump the entitlement to untrammelled collective bargaining.

35. Were the employer's argument correct, then HLDAA would have taken the form of the CROWN EMPLOYEES COLLECTIVE BARGAINING ACT for dealing with this matter. In that statute, the Board can declare essential services so as to ensure that there is no danger to life, health or safety. The Board would consider, when exercising that discretion, what the effect would be of a strike or lock-out on the provision of the particular service under consideration.

36. But that is not the approach adopted in HLDAA. The legislature adopted an "institutional" rather than a "labour relations" approach to the issue. It said, in effect, that whether or not the effect of a strike or lock-out would, in fact, be a danger to the life, health or safety of the residents of an institution, if that institution has the characteristics of a hospital, then it is a hospital and impasse in collective bargaining will not result in industrial action, but in mandatory arbitration instead.

37. The "institutional" approach has some considerable advantages. It avoids the necessity of speculating upon what the effect of a strike by the bargaining unit employees or a lock-out

would be upon the services provided by the institution. It avoids considerable litigation over that speculation.

38. There is a further consideration. If we were to endorse a purely “labour relations” approach then certain anomalies would necessarily arise. The definition of a “hospital” would come to depend upon the relative bargaining powers of the parties. So, for example, if the bargaining unit were large such that the health service provided might be disrupted in the event of dispute, then the employer would be a hospital, otherwise not. What if there were two bargaining units, which singly could not cause a threat to the health service, but together could disrupt it? Would the employer be a hospital in these circumstances? If we were to adopt the employer’s argument and focus singly upon each bargaining unit, then in the example, the employer would be deemed not to be a hospital. But if there were to be a strike simultaneously, by the unions representing the two bargaining units, then the employer’s service would cease. In that circumstance, we would reasonably be called upon to declare the employer a hospital. So, on the same set of facts, the employer would not be a hospital in some circumstance, but it would be in others. That anomaly helps to explain why a purely “labour relations” approach to the issue can lead to absurd results, and why the “institutional” approach is to be preferred.

70. The Board concludes from the above that although the existence of alternatives to an employer’s services is relevant to the issue of the degree to which its clients are dependent on those services, the Board must be circumspect in giving this factor a great deal of weight.

71. Turning to the statutory context for the provision of these services, we find limited guidance from this factor. There is no statutory obligation on Bellwoods to provide its services. To the extent that it is an “approved agency” within the meaning of the *Long Term Care Act, 1994*, however, its continued funding and therefore existence is contingent on its fulfillment of the conditions for approval specified in that Act.

72. At first glance, a comparison of the various statutes to which the parties referred the Board does suggest a dichotomy between those regulated by the *Public Hospitals Act*, *Private Hospitals Act* and *Mental Hospitals Act* on the one hand, and those regulated by the *Long Term Care Act, 1994* on the other, on at least the following basis. As the Board observed in *Red Cross, supra*, the words “hospital” and “institution” appear to have a residential component which does not include the patients’ own home. This dichotomy is supported by the words of the *Long Term Care Act, 1994* which state that a purpose of that Act is “to ensure that a wide range of community services is available to people in their own homes and in other community settings so that alternatives to institutional care exist”.

73. Although it is useful to have reference to the provisions of the legislation governing the services offered by Bellwoods, there is no reason to assume that the above statement of purpose is intended to take a service provider which is regulated by the *Long Term Care Act, 1994* out of the scope of the HLDAA. First, from the evidence, it appears that there are two organizations which belong to PASM, funded under the *Long Term Care Act, 1994* and which have been found by a Minister to be covered by the provisions of HLDAA. Second, a review of the Board’s cases reveals that the distinction between one’s “own home” and an “institution” is not always readily apparent; the dichotomy is sometimes fluid. Rather, there are a range of ways in which services are provided to those that require them because of a physical or mental disability or condition and the locations at which they are provided can contain characteristics of both private homes and institutions.

74. As the Board observed in *Maison Mère des Soeurs de la Charité d’Ottawa, supra*, a residence can be a private residence and yet have institutional aspects to it. The Maison Mère was such a residence. In arriving at its finding that the headquarters of an order of nuns (which included an infirmary for aging or ill nuns) was not covered by the provisions of the HLDAA, the Board found it relevant that the relationship between the patients in the infirmary and the Maison Mère did not exist *because* of the infirmary services. It contrasted this with those institutions which have been found to be

hospitals for the purposes of the HLDAA, where the reason for the relationship between the client and the institution was the provision of the services of care, treatment or observation.

75. In suggesting that the dichotomy between one's own home and an institution is not always apparent, the Board accepts that there are residences which are undeniably private residences and those which are undeniably institutional in nature. In the case before us, the clients who receive services from Bellwoods' outreach program live in their own private residences. The three housing projects operated by Bellwoods, however, share elements of both. The residents would likely view their premises as being their homes and many are long term residents. The residents pay rent either to Bellwoods or, in the case of Mimico, to a third party. Rent is paid to Bellwoods on the basis of a landlord/tenant agreement at Shaw St. and a sub-lease at Church St., which are independent of the agreement for provision of services. The residents are unrestricted in their ability to come and go from their homes. Although Church St. comes closest to the character of a "group home", each resident has private space to which entry is restricted except with tacit or overt permission.

76. On the other hand, there is no doubt that Bellwoods does not offer residence to individuals unless those individuals need and wish to have its services. Likewise, individuals move into one of the Bellwoods residences because they wish to have the support services which Bellwoods provides. An individual who no longer needs the services provided by Bellwoods is expected to leave Bellwoods housing so that it can be offered to another. Further, there is a degree of organization to the residences which is not found in private residences. Bellwoods has an office at each housing location, at which staff are present 24 hours per day. Staff are available both for pre-booked services and as-needed services. Staff have access to, and use, keys to individual premises. There is a certain routine aspect to the manner in which services are provided.

77. To the extent, then, that outreach clients receive services in their own private residences, and other clients receive services in residences which have both private and institutional aspects, the "location at which care is provided" does not provide any firm answer on the issues before us.

78. Turning to the factor of who employs the caregivers, Bellwoods employs its own staff to provide its services, occasionally using the services of an agency for relief purposes. We do not find this to be a helpful factor in the context of the question before us, although it may be more significant in a case such as *Extendicare Diagnostic Services Ltd.*, [1982] OLRB Rep. Mar. 371, where the issue was whether a person employed by a company providing services to a hospital was "a person employed in the operation of a hospital" (section 1(1) of the HLDAA).

79. The employer and the union both referred to the historical practice of collective bargaining in the industry. The Board heard evidence as to the practice of collective bargaining in the PASM group to which the Executive Director of Bellwoods belongs. It is not clear to what degree this group is reflective of the much larger number of organizations engaged in similar work. Assuming that the experience of the organizations in this group is typical, that experience is not very helpful to our determination. It appears that about 15 of these groups are unionized. Of these fifteen, three have undergone HLDAA applications to the Minister of Labour. Two were found to be covered by the HLDAA, and one was not. Presumably, the other organizations bargain under the provisions of the *Labour Relations Act, 1995*, *de facto* if not *de jure*. The only organizations which have undergone a strike or lockout are those which were the subject of HLDAA applications.

80. Further, there are several Board decisions which deal with roughly similar types of organizations as Bellwoods: see *Surex Community Services*, *George Jeffrey Children's Treatment Centre*, and *North Yorkers for Disabled Persons Inc.*, *supra*. There are of course dissimilarities in the facts amongst these organizations. *Surex*, for instance, dealt with an organization providing services to the developmentally disabled in what could be termed group homes. *George Jeffrey* involved an employer which

operates a number of group homes housing young adults with physical and/or developmental handicaps, as well as a non-residential program. *North Yorkers for Disabled Persons Inc.* dealt with a facility housing ten physically disabled adults in a group home similar to the Church St. project. It is unnecessary to review these decisions in detail. In arriving at these decisions, the Board addressed many of the same issues presented to us in this case, while not specifically applying the factors elucidated in *Red Cross*. It is arguable that some are “stronger” cases than the one before us. However, the differences are matters of degree, relating to such matters as the amount of daily care provided, the ratio of caregivers to residents, and the type of disability present. In particular, it is difficult to distinguish in a substantial way the facts of this case and those in *North Yorkers for Disabled Persons Inc.*

81. In sum, many of the factors identified in *Red Cross* do not point firmly in one direction or another in this case. Ultimately, the Board is persuaded to its conclusion by the type of care provided, the degree of care provided, and perhaps most significantly, the extent to which the recipients depend on the care for their continued health and safety.

82. In this latter respect, the Board must address the arguments made by counsel for the employer relating to the philosophy of independent living which shape the manner in which the services of Bellwoods are provided. There is no question that the *purpose* of the care and the model in which it is provided is to maximize the independence of Bellwoods clients. There is also no question that without the care, the independence of the clients would be severely compromised. There is nothing contradictory about the notion that a person with a certain degree of independence may be reliant on the provision of certain services in order to maintain that degree of independence.

83. There need not be any stigma attached to the dependence on services, just as there need not be any stigma attached to a finding that an employer is an “other institution” and therefore a “hospital” within the meaning of the HLDAA. Just as “hospital” is a term of art within the context of that Act, so is the term “institution”. A finding that a facility is a “hospital” within the meaning of the HLDAA does not mean that it is expected therefore to act like the conventional understanding of a hospital. A finding that a facility is an “institution” within the meaning of HLDAA likewise does not mean that it is expected to treat its clients differently or that its clients should view themselves or their service-provider differently. Essentially, all that it means is that these clients are assured of a continuation of services in the event of a labour dispute. The HLDAA, as expressed by the courts, by Ministers of Labour and by the Board, is concerned with the *protection* of certain persons with special needs in the event of labour disputes. The materials filed by the employer describe the independent living movement as providing the physically disabled with the opportunity to become integrated into the community. One of the ways this opportunity has been provided is through community-based housing. We do not think it could have been intended that this opportunity would lead to less protection than if these persons had remained separate from the community.

84. The Board has also considered the reasons of the Minister in his March 28, 1988 finding that Bellwoods was not an employer covered by the HLDAA. The essential facts remain the same today. Although it is not clear to what extent this was determinative, the Minister did appear to place weight on the fact that the services provided by Bellwoods were not medical in nature. Since this decision was made before *Dignicare Inc.*, *supra*, this is not surprising; for this reason, however, we do not find that decision very helpful in our deliberations.

85. Finally, it is not clear to the Board, and it is not necessary to determine, whether the outreach portion of Bellwoods’ services would lead if considered alone to a finding that Bellwoods is an “other institution” and therefore a “hospital” within the meaning of the HLDAA. Both parties were agreed

that all of the activities of this employer should be considered together in determining whether the HLDAA applied. The outreach program is a substantial portion of the work of Bellwoods, but not so substantial that the Board would be inclined to remove the protection of the HLDAA from all of Bellwoods' clients based on a view of the outreach program.

86. For the above reasons, the Board advises the Minister that Bellwoods is a "hospital" within the meaning of the HLDAA.

ADVICE OF BOARD MEMBER JAMES A. RONSON; June 25, 1997

In all of the circumstances of this case, I advise the Minister of Labour that labour relations generally, and those specifically involving the Union and Bellwoods would be best served by confirming the decisions of the Honourable Greg Sorbara and the Honourable Bob MacKenzie. Simple, basic fairness requires that Bellwoods should not be designated a hospital under the HLDAA by the Minister or considered such by this Board. In all the circumstances, everyone would be best served by having the Union take the issue to the Divisional Court so we might all understand the breadth of the *Dignicare Inc.* decision.

3612-96-R Union of Needletrades, Industrial and Textile Employees Ontario District Council, Applicant v. **Black Photo Corporation**, Responding Party v. Group of Employees, Objectors

Certification - Employee - Evidence - Membership Evidence - Reconsideration - Representation Vote - Trade Union Status - Board finding that locals of UNITE and UNITE's Ontario District Council are inter-related organizations each of which has status of a trade union within the meaning of the Act - Employer and objecting employees asking Board to dismiss application on grounds that application filed by District Council was accompanied by evidence of membership in International union - Board seeing no reason to overturn evidence of earlier finding regarding 40 percent "appearance" of support in applicant - Board allowing union to challenge employment status of two individuals for first time after the vote where their status was already in issue for other reasons and their ballots were already segregated

BEFORE: *Janice Johnston*, Vice-Chair.

APPEARANCES: *L. A. Richmond, A. Dagg, D. Ladd and N. Keresztesi* for the applicant; *A. P. Tarasuk, William McNaughton, T. Grouvis and A. Henkelman* for the responding party; *C. J. Abbass and Tom Carter* appearing on behalf of the objecting employees.

DECISION OF THE BOARD; June 19, 1997

1. This is an application for certification.
2. By decision dated February 12, 1997, the Board (differently constituted) after examining the evidence before it and concluding that it appeared that not less than forty percent of the individuals in the bargaining unit proposed in the application for certification were members of the union at the time of the application, directed that a representation vote be held.
3. Prior to the representation vote, the parties reached the following partial agreement with regard to the bargaining unit description:

all employees of Black Photo Corporation at 371 Gough Road in the Town of Markham, save and except Team Leaders and persons above the rank of Team Leaders, office, clerical and sales staff.

Clarity Note: On site store staff, Marketing, Accounting, MIS, Inventory, Purchasing, Service, Mini Lab Operations staff are not included in the bargaining unit and pending resolution by the Board excluding as well Customer Service Smile Center and Black's express.

4. There were 153 persons on the voters' list at the representation vote held on February 14, 1997 and 139 people voted. Of the ballots cast, sixty-five were marked in favour of the applicant and sixty-one were marked against the applicant. Eleven ballots were segregated and not counted and two ballots were spoiled.

5. At an officer's meeting on March 5, 1997, the parties were able to agree that six of the eleven individuals previously in dispute were eligible to vote. However, the ballots were not counted at that time and have not as yet been counted. The parties were also able to agree on the following bargaining unit description:

all employees of Black Photo Corporation at 371 Gough Road in the Town of Markham, save and except Team Leaders and persons above the rank of Team Leaders, office, clerical and sales staff.

Clarity Note: On site store staff, Black's Express, Marketing, Accounting, MIS, Inventory, Purchasing, Service Mini Lab Operations staff are not included in the bargaining unit.

6. Accordingly, at the hearing before me, the eligibility of five individuals to cast a ballot was still in dispute. The individuals in dispute are Stephen Beagle, Susan Earhart, Russel De Souza, Nicole Lehman and Grant O'Halloran.

7. In addition to the above issue, the responding party, Black Photo Corporation (the "company" or the "employer") challenged the status of the applicant, the Union of Needletrades, Industrial and Textile Employees Ontario District Council (the "union") as a trade union pursuant to section 1(1) of the *Labour Relations Act, 1995* (the "Act"). The company also challenged the form of the membership evidence utilized by the union arguing that the name on the membership card was different from the name of the applicant.

8. The union by correspondence dated February 14, 1997, the day of the vote, indicated that it wished to rely on section 11 of the Act and requested that the Board certify the union pursuant to that section. Particulars of the employer's alleged misconduct were provided in the letter.

9. Accordingly, at the hearing before me there were four issues to be dealt with:

- (i) the list issues (the eligibility of the five individuals to cast a ballot);
- (ii) the trade union status issue;
- (iii) the membership evidence issue; and
- (iv) the section 11 application.

10. At the hearing the parties agreed to deal with the status issue, the membership evidence issue and to deal with, on a preliminary basis, four of the five individuals whose entitlement to cast a ballot was in dispute. It was agreed that the Board would deal with the union's application pursuant to section 11 of the Act if or when it became necessary to do so.

11. The only witness to testify before the Board was Ms. Alexandra Dagg, Business Manager of the Ontario District Council of the Union of Needletrades, Industrial and Textile Employees (for ease of reference U.N.I.T.E.). Ms. Dagg has been the Business Manager of the Ontario District Council (the "District Council") since 1990. Prior to that, she was an organizer and the Education Director. She has been employed by the District Council for a total of 12 years. Ms. Dagg gave her evidence in a candid, forthright manner and I found her to be a very credible witness. Ms. Dagg's evidence was directed to the issue of the trade union status of the applicant. In addition to her *viva voce* evidence, the applicant also put into evidence extensive documentary support for its position that the Board should find the applicant to be a trade union within the meaning of the Act.

The Status Issue

(a) The Facts

12. The applicant in this case is the Union of Needletrades, Industrial and Textile Employees Ontario District Council.

13. Prior to 1990, the District Council operated pursuant to the constitution of the International Ladies Garment Workers Union (the "ILGWU"). That constitution provides for the creation of a joint board pursuant to Article 6, a joint council pursuant to Article 7 or a district council pursuant to Article 8. At that time, there were three locals of the ILGWU which belonged to the District Council. They were Local 14, Local 83 and Local 92, all of whom appear to have been issued a charter by the ILGWU in 1911. These three locals are members of the District Council and it appears that they have existed continuously since their charters were issued.

14. At the hearing, the applicant was unable to provide the Board with copies of the original charters for Locals 14, 83 and 92 or for the District Council. Despite the best efforts of the applicant the charters could not be located. Instead, a letter dated March 6, 1997 from Mr. Jay Mazur, President of the ILGWU was provided to the Board. It reads as follows:

Dear Sister Dagg,

Listed below are the dates the locals belonging to the Ontario District Council were originally chartered by the ILGWU: Local 14, Jan. 4, 1911; Local 83, April 3, 1911; Local 92, May 29, 1911; and Local 136, Nov. 15, 1994. As you know the ILGWU merged with ACTWU on July 1, 1995 to form UNITE.

Regarding the history of the District Council: the Toronto Cloak Joint Board was formed on June 30, 1912 and the Toronto Dress and Sportswear Joint Board was formed on Dec. 13, 1971. On Nov. 1, 1982 these Joint Boards merged and became the Ontario Cloak Dress Sportswear District Council, commonly known as the Ontario District Council.

Faternally,

Jay Mazur
President

15. This letter was written in response to telephone enquiries made by Ms. Dagg. Counsel for the employer objected to this letter's admission on the basis that it constituted hearsay and because it did not constitute the best evidence of the charters. After considering the submissions of counsel on this point, I admitted the letter subject to the weight it should be given.

16. The District Council has four full-time staff, Ms. Dagg, a Business Agent and two organizers. The local unions do not have full-time staff, nor do they have their own separate bank accounts. Although the local unions have stewards who deal with grievances at the local level (and other local

issues), it is the District Council that processes grievances to arbitration. Either Ms. Dagg or the Business Agent negotiates and signs collective agreements on behalf of the locals. The District Council staff do all of the organizing on behalf of the locals. All of the locals are represented on the District Council by elected delegates.

17. Local 136 was chartered by the ILGWU on November 15, 1994. It too is a member of the District Council and is provided services by the full-time employees of the District Council. It elects members or delegates to sit on the District Council.

18. On April 19, 1990, the District Council adopted new by-laws. These by-laws make it clear that the District Council is to be made up of all affiliates of the ILGWU in the Province of Ontario. These by-laws were drafted by Ms. Dagg and were approved and adopted by the delegates to the District Council meeting held on April 19, 1990. A copy of the by-laws and the minutes of this meeting, which were taken by Ms. Dagg, were provided to the Board.

19. All of the District Council staff report to Ms. Dagg who reports to the District Council. Once every three years, an election is held. Ms. Dagg's position, amongst others, is open to election. The District Council holds monthly meetings, except in the summer, and Ms. Dagg provides the members of the District Council with regular reports concerning ongoing activities such as grievances, organizational campaigns or negotiations, and on matters such as finances and operational issues. There is a management committee of the District Council which is made up of the President, Vice-President, and Secretary of the District Council as well as Ms. Dagg and one other District Council member. This Management Committee meets and discusses issues such as staff hiring and compensation. It then makes a recommendation to the District Council as a whole which votes on the issue.

20. On October 31, 1992, a Certificate of Affiliation was issued to Local 12 of the ILGWU. Local 12 is chartered under the Associate Membership Program of the ILGWU (referred to as "A.I.M."). This program is aimed at providing women homeworkers with a variety of services. However, the ILGWU does not have the authority to bargain on behalf of the members of Local 12. A.I.M. has its own by-laws which govern the affiliated locals.

21. Counsel for the applicant provided the Board with a total of 33 certificates which had been issued by the Board to the ILGWU and one which was issued to the Sportswear Local 199 ILGWU on October 26, 1963. Although the name of the ILGWU on occasion has an apostrophe after either the "s" in Ladies or the "s" in Workers, I am not prepared to give this any significance. Accordingly, the status of the ILGWU as a trade union has long been accepted by the Board.

22. On July 1, 1995, the ILGWU and the Amalgamated Clothing and Textile Workers Union (ACTWU) merged to form the Union of Needletrades, Industrial and Textile Employees (U.N.I.T.E.). This merger occurred at a convention in Florida. The District Council sent delegates including Ms. Dagg to the convention. A vote was held at the convention and it was virtually unanimous in favour of the merger. A copy of the merger agreement and the new U.N.I.T.E. Constitution was filed with the Board. The District Council is currently governed by the U.N.I.T.E. Constitution and the local by-laws of the Ontario District Council of the ILGWU, which were amended to reflect the new name. The trade union status of U.N.I.T.E. was found in Board File No. 1471-95-R as reflected in the decision dated August 21, 1995.

23. Counsel for the applicant provided the Board with copies of the cover page of various collective agreements which had been negotiated by the District Council on behalf of U.N.I.T.E. Generally, the collective agreement is between a particular company and the Ontario District Council of Union of Needletrades, Industrial and Textile Employees with reference to a particular local or locals. In addition, copies of collective agreements in existence prior to the merger, which refer to the

company and the Ontario District Council of the International Ladies' Garment Workers Union and various locals, were also provided to the Board.

(b) Argument

24. Counsel for the applicant argued that the Board should give the letter authored by Mr. Mazur regarding the history of Locals 14, 83 and 92 and the District Council the same weight as it would a copy of the Charter issued by the International to a local union. A charter is simply a piece of paper from the International Union stating that a local union has been chartered on a particular date. The letter from Mr. Mazur does the same thing. It is a document from the International stating the dates upon which charters were issued. Simply because the applicant cannot locate copies of charters which were issued in 1911, does not negate their existence. In his view, the applicant has supplied the best evidence of the charters that it can and the Board should accept the letter and give it the same weight as it would copies of the charters themselves. It is not necessary to set out the remainder of the applicant's arguments on the status issue. In support of his argument, counsel referred me to *Ontario Hydro*, [1989] OLRB Rep. Feb. 185.

25. Employer counsel took the position that the applicant must produce the charter of the local unions or something akin to a charter in which the authority to be a local union was granted. In order for the Board to conclude that a council of trade unions exists, the Board must be satisfied that there are trade unions that have ceded all or part of their authority to a council, which must have an organizational structure. A body can do everything that a trade union or council of trade unions does and still not be a trade union or council of trade unions within the meaning of the Act. In support of this proposition, reference was made to *Hydro Electric Power Commission of Ontario*, [1971] OLRB Rep. Aug. 501, *Buckley Cartage Limited*, [1963] OLRB Rep. Nov. 424 and *Underwater Gas Developers Limited*, [1967] OLRB Rep. Sept. 555. In support of his argument that the applicant must meet the technical requirements imposed by the Board including the requirement to provide copies of its original charter before the Board could find it to be a trade union, counsel for the employer provided the Board with *Opera Ghost Production*, [1990] OLRB Rep. Mar. 325, *Windsor Raceway Holdings Limited*, [1979] OLRB Rep. Feb. 154 and *J. D. Carrier Shoe Co. Ltd.*, [1968] OLRB Rep. April 54.

26. It was the employer's view that it was essential for the applicant to produce a copy of the original charter for the local unions and a charter for the District Council. Its failure to do so is fatal to any finding of trade union status. Counsel argued that the Board should not rely on the letter from Mr. Mazur as proof that the charters exist. The constitution of the ILGWU requires that a charter must be granted and the failure to produce documentary evidence of the charters should lead the Board to conclude that they do not exist. Accordingly, regardless of the powers it exercises and what it has done, the District Council is not a council within the meaning of the Act.

27. Counsel for the intervening employees adopted the submissions of the employer. He also took the position that the wording in the constitution of U.N.I.T.E. and the by-laws of the District Council were insufficient to establish that the purpose of the organization was to represent and regulate the relationship between the employees and their employer. It was also suggested that as the local unions making up the District Council did not have officers, they are not trade unions within the meaning of the Act.

28. In response, the applicant's counsel conceded that they had been unable to locate copies of the various charters, but urged the Board to conclude that there is nothing magical about the charter. The letter from the President of U.N.I.T.E., who is the President of the organization that grants the charters, sets out that charters were issued and the history of the District Council. Accordingly, this letter should be given the same weight as a copy of the original charter. Given that the District Council and U.N.I.T.E. are existing organizations representing employees, each with a constitution and by-laws

and that they are organizations which have been recognized by the international parent and given the right to participate in conventions, the Board should find that the union is a trade union within the meaning of the Act.

(c) Decision

29. Section 1(1) of the Act defines a trade union as follows:

1. (1) In this Act,

• • •

“trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

30. After considering the documentary and *viva voce* evidence and the submissions of the parties, I am of the view that the applicant, the Union of Needletrades, Industrial and Textile Employees Ontario District Council is a trade union within the meaning of section 1(1) of the Act.

31. In *Local 199 UAW Building Corporation*, [1977] OLRB Rep. July 472, the Board set out a number of steps to be followed by a group of employees seeking to form an organization which would meet the statutory definition of a trade union. They read as follows:

- (1) A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings;
- (2) the constitution should be placed before a meeting of employees for approval;
- (3) the employees attending such meeting should be admitted to membership;
- (4) the constitution should be adopted or ratified by the vote of said members;
- (5) officers should be elected pursuant to the constitution.

While it is useful to note these steps as a starting point in this analysis, it is important to remember that these steps pertain to the creation of a new organization. When an organization has existed for a considerable period of time, which is certainly true in this case, the Board has acknowledged that it is less critical to focus on the steps originally taken to bring the organization into existence (see in this regard paragraph 44 of *Ontario Hydro, supra* and the cases cited therein). I agree with the Board’s observation in *Opera Ghost Productions Inc.*, [1990] OLRB Rep. Mar. 325 where it is noted:

12. • • •

The Board cannot itself impose any pre-conditions to the existence of a trade union. Any such requirements must be found in the legislation (*Re CSAO (Inc. and Oakville Trafalgar Memorial Hospital Association*, [1977] 2 O.R. 498 (Ont. C.A.)). The Board does not “confer” trade union status. Something is either a trade union or not as a matter of fact. The board’s function is to make that factual determination. It is not open to the Board to declare that an organization of employees which is factually a trade union is not one and vice versa.

13. Although the requirement that a trade union be an “organization” implies that it must have some structure, and the nature of the rights, obligations and duties that a trade union has under the *Labour Relations Act* suggests that there are certain characteristics that it must have, the only pre-conditions to trade union status under the Act are that at least two employees have agreed to be bound by the

terms of an identifiable agreement between them (i.e., a constitution), which section 84 of the Act seems to contemplate will be in writing, for purposes which include the regulation of relations between employers and employees. There is nothing in either the *Labour Relations Act* or otherwise which dictates how an organization must be formed, structured or operated in order to be a trade union within the meaning of the *Labour Relations Act*. There is therefore no one formula which must be followed in order to successfully create an organization which is a trade union within the meaning of the Act. Whether a trade union has come into or continues to exist is a question of fact to be determined having regard to the circumstances in each case (see, for example, *Ontario Hydro*, [1989] OLRB Feb. 185; *L'Abbe Construction (Ontario) Ltd.*, [1987] OLRB Rep. Oct. 1191; *Hartley Gibson Company Limited*, [1986] OLRB Rep. Nov. 1517).

32. In recent years the Board has adopted a less technical and more practical approach to the question of trade union status. In *Caterair Chateau Canada Limited*, [1994] OLRB Rep. April 365, the Board commented as follows:

8. While the "five step" procedure set out by the Board in *U.A.W. Building Corporation*, *supra*, remains a useful guideline both for the Board in determining the status of a trade union under the Act and for persons wishing to form a trade union, the Board has made it clear that that procedure is not the exclusive manner of establishing a trade union. (See, for example, *Service Employees International Union*, [1991] OLRB Rep. Feb. 267; *Local 199 U.A.W. Building Corporation*, *supra*.)

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More generally, the Board is interested in the substantial, rather than technical, compliance with the procedural steps involved in the formation of the trade union, since the purpose of its inquiry is not so much in ensuring that the precise requirements of the constitution are followed rather than ascertaining that the organization seeking trade union status is a viable one for the purpose of carrying out its obligations under the Act.

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12. It is important to note that the Board is far less concerned with the minute issues of constitutionality of the actions of an organization seeking trade union status than with determining its organizational viability and its ability to carry out the statutory obligations placed upon trade unions by the Act. In this respect, the Board is concerned with the constitution only as evidence of the existence of a viable organization and, therefore whether it is a trade union under the Act. (*Re C.S.A.O. National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] O.R. (2d) 498.) ...

33. The letter from Mr. Jay Mazur set out in paragraph 14 states that the local unions 14, 83 and 92 of the ILGWU were chartered in 1911. Ms. Dagg testified that she was unable to locate a copy of the original charters to these locals nor was she able to locate a charter for the District Council. I accept that Ms. Dagg did everything possible to attempt to locate these charters. Despite their historical value, it is easy to appreciate that it might be difficult to locate documents issued in 1911 or 1912. Accordingly, given Ms. Dagg's evidence in support of her efforts to locate the charters and her evidence concerning how the letter of March 6, 1997 was acquired, I am prepared to accept the letter as proof that locals 14, 83 and 92 were chartered by the ILGWU in 1911 and that what is now the District Council was chartered by the ILGWU in 1912. It would be unduly technical for me to insist on the production of the original charters for the locals and the District Council and in their absence to decline to conclude that the applicant is a trade union within the meaning of the Act. The applicant has provided me with copies of the relevant constitutions, by-laws and minutes of meetings in which they were adopted.

34. The submissions of counsel for the group of employees to the effect that the local unions do not have officers, is not borne out by the facts. The local unions elect stewards who deal with the various companies with which the union has a collective bargaining relationship on daily or local issues. The locals elect delegates to the District Council and the District Council has officers and

directed, was precluded by law from considering any challenge to the union's evidence of membership at this point in the proceedings.

40. The parties agreed to argue this matter as a legal question based on the membership documents before the Board and no evidence was called. Counsel for the group of employees also made a motion to dismiss this application for a failure to make out a *prima facie* case. In essence, the *prima facie* motion went as follows: as the applicant had failed to file membership evidence, there was no basis upon which the Board should have directed a vote or could grant a certificate to the union and accordingly this application for certification should be dismissed. Both objections to or motions with regard to the membership evidence were argued at the same time.

41. Before turning to the submissions of the parties, it is helpful to set out the relevant sections of the Act. These are:

7. (1) Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees in the unit are not bound by a collective agreement, a trade union may apply at any time to the Board for certification as bargaining agent of the employees in the unit.

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(7) The right of a trade union to apply for certification under this section is subject to subsection 10(3), section 67 and subsection 160(3).

(8) An application for certification may be withdrawn by the applicant upon such conditions as the Board may determine.

(9) If the trade union withdraws the application before a representation vote is taken, the Board may refuse to consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year or such shorter period as the Board considers appropriate has elapsed after the application is withdrawn.

(10) If the trade union withdraws the application after the representation vote is taken, the Board shall not consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year has elapsed after the application is withdrawn.

(11) The trade union shall deliver a copy of the application for certification to the employer by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board.

(12) The application for certification shall include a written description of the proposed bargaining unit including an estimate of the number of individuals in the unit.

(13) The application for certification shall be accompanied by a list of the names of the union members in the proposed bargaining unit and evidence of their status as union members, but the trade union shall not give this information to the employer.

(14) If the employer disagrees with the description of the proposed bargaining unit, the employer may give the Board a written description of the bargaining unit that the employer proposes and shall do so within two days (excluding Saturdays, Sundays and holidays) after the day on which the employer receives the application for certification.

8. (1) Upon receiving an application for certification, the Board may determine the voting constituency to be used for a representation vote and in doing so shall take into account,

- (a) the description of the proposed bargaining unit included in the application for certification; and

(b) the description, if any, of the bargaining unit that the employer proposes.

(2) If the Board determines that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appear to be members of the union at the time the application was filed, the Board shall direct that a representation vote be taken among the individuals in the voting constituency.

(3) The number of individuals in the proposed bargaining unit who appear to be members of the trade union shall be determined with reference only to the information provided in the application for certification and the accompanying information provided under subsection 7(13).

(4) The Board shall not hold a hearing when making a decision under subsection (1) or (2).

(5) Unless the Board directs otherwise, the representation vote shall be held within five days (excluding Saturdays, Sundays and holidays) after the day on which the application for certification is filed with the Board.

(6) The representation vote shall be by ballots cast in such a manner that individuals expressing their choice cannot be identified with the choice made.

(7) The Board may direct that one or more ballots be segregated and that the ballot box containing the ballots be sealed until such time as the Board directs.

(8) After the representation vote has been taken, the Board may hold a hearing if the Board considers it necessary in order to dispose of the application for certification.

(9) When disposing of an application for certification, the Board shall not consider any challenge to the information provided under subsection 7(13).

10. (1) The Board shall certify a trade union as the bargaining agent of the employees in a bargaining unit that is determined by the Board to be appropriate for collective bargaining if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

(2) The Board shall not certify the trade union as bargaining agent and shall dismiss the application for certification if 50 per cent or less of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

(3) If the Board dismisses an application for certification under this section, the Board shall not consider another application for certification by the trade union as the bargaining agent of the employees in the bargaining unit until one year has elapsed after the dismissal.

(a) Argument

42. Counsel for the union argued that it was not now open to the Board to consider a challenge to the membership evidence filed by the union. Section 8(9) and section 7(13) mean exactly what they say. In addition, the Board in its February 12, 1997 decision made the finding that the union had the appearance of membership support of not less than forty percent amongst the individuals in the proposed bargaining unit. That finding is not now attackable except in circumstances where a union obtained a certificate by fraud contrary to section 64(2) of the Act. In his view, all that is necessary to obtain a vote is that the union has the appearance of forty percent support. In the absence of allegations of fraud on the part of the union, it is not necessary for the Board to determine conclusively whether in fact the union had the support of more than forty percent of the bargaining unit members, as the results of the vote will determine whether the union has sufficient support to be certified pursuant to the Act or whether the application should be dismissed. Under the new legislation, in which a vote is held to determine the wishes of the employees, the documentary membership evidence filed by trade unions no longer has the significance it did when the Board decided applications for certification on the basis of that documentary evidence. Now the representation vote is the determinative factor in deciding

whether a certificate should issue to the union. In support of this position, counsel referred to the decision of the Board in the *Corporation of the City of Toronto*, [1996] OLRB Rep. July 552, in particular to paragraphs 132 to 151 of that decision and to *R-Theta Inc.*, [1997] OLRB Rep. Jan./Feb. 116.

43. Counsel for the group of employees argued that this application for certification should be dismissed as the applicant has failed to make out a case for the orders or the certificate they are requesting. He argued that the term “member” of a trade union and “membership” in a trade union includes a person who has applied for membership, not a person who “appears” to have applied for membership. He disagreed with the applicant’s interpretation of section 8 and section 7(13) of the Act. In his view, section 7(13) requires that the union file a list of the names of the union members and evidence of their status as union members. The union must have members, not merely appear to have members, and the Board does not have the authority to give a certificate to a union that does not in fact have members. The issue with regard to the “appearance” of support goes to the number of union members, not to whether or not in fact the individuals were members of the trade union. With regard to the appropriateness of challenging the membership evidence after a vote has been held, counsel pointed out that the only way a five-day vote system can work is if the Board looks at the appearance of the membership evidence to direct the vote but then does not preclude an attack on an application that does not meet the basic elements required to support an application for certification. He suggested that I should consider the decision made on February 12, 1997 not to be a decision but to be an administrative act only. In his view, as a procedural matter, prior to deciding the issue of the sufficiency of the membership evidence, the Board must give the parties the opportunity to call evidence and make submissions regarding whether the cards filed in support of the application are indicative of membership in the applicant union or some other organization.

44. Employer counsel suggested that the Board’s review and analysis of the membership evidence supplied by the union should remain the same whether the documentary evidence is being relied upon to direct a representation vote, or to hand out a certificate to the union. As the wishes of the employees cannot be disclosed, except to the Board, the Board has always demanded that the union maintain high standards with regard to documentary evidence. Where the application for membership does not name the applicant and this is not disclosed in the A-4, the application for certification should be dismissed. The Board has at all times, as a statutory tribunal, the duty to follow the statute. If the statute requires membership in the applicant, it must be there and before the Board. The Board must be satisfied with regard to the membership evidence and must deal with the issues raised concerning it whenever they are raised. He distinguished the *Corporation of the City of Toronto*, *supra* and *R-Theta Inc.*, *supra*, on the basis that they both dealt with the appearance of the percentage or amount of membership support the union had. In this case, there is no evidence of membership in the applicant before the Board. The Board made an error in its decision of February 12, 1997 as there was no membership evidence upon which to direct the vote. He suggested that when an error is made, there is a duty to correct it. Counsel accepted that the Board had membership evidence before it but it was not evidence of membership in the applicant. In his view, the applicant might as well have used the membership cards of the United Steelworkers of America or the Canadian Auto Workers as the cards it did, as the effect would be the same. The employer stressed that it was not taking issue with the numbers or the percentage of support, but that the membership evidence filed did not establish membership in the applicant. The employer’s position was that the membership evidence filed does not support the appearance of forty percent of the employees in the bargaining unit being members of the applicant and that the challenge being made was not precluded by section 8(9) of the Act.

45. In response, union counsel suggested that the wording of the Act does not support the position urged upon me by the employer and group of employees. If the Board looks to section 8(3), the language clearly states “appear to be members of the trade union”. Counsel for the group of

employees states that he is not challenging the “information” provided by the union but whether it applies to the applicant. However you word it, that is a challenge to the membership evidence which is prohibited by section 8(9) of the Act. The Act does not restrict the challenge to the numbers, it restricts a challenge on any basis. Union counsel reiterated that the vote-based system under the new legislation is not the same as the former card-based system and that it is the vote that now determines whether or not a union will be certified. The cards are not as important as they used to be, as they only get you a vote, which then determines the employee wishes.

46. In response to the motion for dismissal brought by counsel for the group of employees, the union suggested that it would not be appropriate or fair for the Board to consider a challenge to the membership evidence at this point in the proceedings. Had a challenge been raised prior to the vote or prior to the Board’s decision to direct the vote, the union would have been in a position to correct any deficiencies in the membership evidence or withdraw the application. The Board in its earlier decision indicated that the applicant was entitled to a vote and it must be able to rely on that decision. Now that the vote has been taken, if the employer’s challenge is successful, the union faces a dismissal of the application and the imposition of a bar. Accordingly, the Board should not consider any challenge to the form of the cards or the A-4 declaration or any other aspect of the membership evidence submitted.

(b) Decision

47. In this case, the application for certification was made in the name the Union of Needletrades, Industrial and Textile Employees Ontario District Council. The membership cards filed with the application state that the individual is applying for membership in the Union of Needletrades, Industrial and Textile Employees (AFL-CIO-CLC). The panel of the Board which directed the vote by decision dated February 12, 1997, reviewed the membership evidence filed in this case and determined that forty percent or more of the individuals in the bargaining unit appeared to be members of the trade union. That decision is currently being challenged by the employer and a group of employees. Accordingly, I am prepared to treat this challenge to the Board’s February 12, 1997 decision as a request for reconsideration of that decision. For all of the reasons that follow I am satisfied that this request for reconsideration ought to be dismissed. I am satisfied that the Board’s determination in the decision dated February 12, 1997, that forty percent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union at the time the application was filed, was correct.

48. This is the first case in which the veracity or the form of the membership evidence supplied to the Board by a union has been called into question under the new certification system created by Bill 7. As was correctly pointed out by the parties, the issue of the quantum of support (i.e. the forty percent issue) has been dealt with by the Board in several cases to date (see in this regard the *Corporation of the City of Toronto*, *supra*, *R-Theta Inc.*, *supra*, and *Burns Security*, [1996] OLRB Rep. April 192). Although the Board has commented in obiter with regard to the issue of the form or the quality of the membership evidence in those cases, this is the first instance in which the issue has been directly challenged and litigated. However, the Board’s analysis with regard to the interpretation of section 7(13), 8(2), 8(3) and 8(9) of the Act in the decisions referred to above is clearly relevant to the issue before me.

49. The certification process prior to the passage of the current legislation was primarily a “card-based” system in which the Board decided certification applications based on the documentary evidence of membership filed by the union with its application for certification. Although representation votes were conducted in certain circumstances under that system, approximately eighty to ninety percent of the applications for certification were decided without a vote. That approach was changed under the current statute. The new approach to certification applications requires that there be a “vote

in every case” and that the vote be conducted very quickly. A review of the previous system is provided in *The Corporation of the City of Toronto, supra*, (see paragraphs 67 to 81) and it is not necessary to set it out again. However, it is helpful to look at the Board’s analysis in *The Corporation of the City of Toronto, supra*, with regard to the differences between the previous document-based/card-counting system and the current vote system and the Board’s analysis of the wording of the certification provisions contained in the current legislation. In that regard the decision reads as follows:

132. Under the pre-Bill 7 regime, the Board had to make a number of findings with respect to union membership, based largely upon documentary evidence; and in the Bill 40 period (1992-95) there was a rather precise list of the kinds of evidence that the Board could or could not consider when deciding whether the union had established the requisite support, or whether a representation vote should be ordered. The details do not matter. What is significant is that both before and after Bill 40, these evidentiary disputes were a frequent cause of litigation, because the documents were all the Board had to go on to make the required finding of membership, and thus the documents were the subject of frequent attack. From an employer’s perspective there was an understandable suspicion of documents that it was not allowed to see (section 119 of the Act), and might have been collected in circumstances where peer or other pressures had influenced the employee’s choice. Moreover, from a purely tactical point of view, if the employer could cast doubt on the union’s membership evidence, the Board might order a representation vote: union supporters would then have an additional opportunity to change their minds, and the employer would have an opportunity to communicate with employees and persuade them to forego the collective bargaining option. A vote involved a contest for employee allegiance in which the employer could deploy formidable tools of persuasion and had some real advantages. Under the former model, therefore, there were lots of reasons to attack the documents.

133. Under Bill 7, however, the focus shifts to a representation vote rather than findings based solely on documentary evidence. The vote becomes the final arbiter, and the quality of the membership documents signed some days or weeks before, becomes much less significant. Employee wishes, collectively expressed, become the critical factor for granting certification.

134. Against that background, it is easy to understand why the Legislature provided that when determining the number of individuals from the bargaining unit who “appear” to be union members, an appearance is sufficient, the Board need look only to the information provided in the application for certification; and, pursuant to section 7(13) in disposing of the certification application, the Board does not consider challenges to that information. Bill 7 inhibits litigation over the sufficiency of the membership information because the apparent level of support so disclosed by those documents no longer determines the union’s right to certification. What matters is how many employees cast ballots in favour of the union.

135. Under the new scheme, certification depends upon employee wishes recorded in a representation vote. The quick vote is the central feature of the new process. But by the same token, once the vote becomes the exclusive means of testing employee wishes, we think that it is much less likely that the Legislature intended a lot of “front end litigation” over the right to have such a vote taken - let alone a scenario like the present one where the employee wishes might have to be disregarded altogether. We are also reluctant to accept an interpretation that means a Bill 7 vote in this case is more difficult to obtain now than it would have been under Bill 40.

136. Is there an alternative? Could the Board avoid the problem of “front end litigation” and consequent delay, by directing a vote within five days as an administrative matter, but then declining to give effect to it (assuming that a majority of the employees voted in favour of union representation) pending a *subsequent* determination by the Board of *actual* 40 per cent “card support” among the employees ultimately found to be in the unit? Could the Board litigate the threshold test later on? In other words, could the Board treat the new Bill 7 procedures as if they mirrored the former pre-hearing vote process?

137. The problem with this approach is that it has no support in the language of the statute. The decision to order the vote is made on the basis of a *determination* of an *appearance*; and once that determination is made, nothing in the statute contemplates it being revisited. Indeed, the statute says the opposite: the results of the vote will be given effect, (perhaps subject only to unfair labour practice allegations - see section 11). Section 10(1) provides that where the union wins the vote, the

union “shall” be certified. The language is mandatory. The union’s certification is, quite explicitly, *not* subject to a second check of its entitlement to the vote in the first place.

138. Had the Legislature intended some *ex post facto* determination of *actual* 40 per cent card support, as opposed to an *appearance* of 40 per cent support, the Legislature could have reproduced language such as section 9(4) of the old pre-hearing vote procedure. However, when one compares the language of the current statute to the language of section 9 of the old Act, it is evident that the Act *used to, could have, but now does not* make a *finding* of *actual* support at any level (as opposed to the appearance of support) a condition precedent to certification. The structure of Bill 7 does not envisage later litigation about, or confirmation of, the section 8(2) decision. Nor, as we have already mentioned, is “front end litigation” practically feasible in 5 days, or seemingly permitted by section 8(4).

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150. Isn’t there something improper about a union being awarded bargaining rights after a representation vote, when it never actually had sufficient support to entitle it to the vote in the first instance? The practical answer to that is that it doesn’t happen very often and when it does it is mostly by accident, so why should the employees’ entitlement to vote on the issue be lost because of the union’s miscalculation. On a more panoramic level though, the answer we think is simply “no” - not in the context of the present statute and the values that it promotes. The statute now provides enhanced scope for the expression of employee wishes in several areas (strikes, ratifications, certification) and provides the means to give effect to that expression. More than that, the statute makes it clear that the result of a representation vote should govern even where the membership evidence tendered by the union was somehow unsatisfactory (see section 8(9)). In other words, in a quick “vote in every case” regime, ultimate faith is based on the ballot box as the means of testing employee wishes.

151. Given the premise that there is to be a “vote in every case”, there is also something very pragmatic about the scheme of the new Act. Rather than set up an elaborate administrative machinery to assess membership cards and compare them to lists and to signatures provided by the employer, and rather than entertain disputes about entitlement to votes and appropriate voting constituencies, the statute has prescribed a scheme of incentives and sanctions to regulate behaviour with a view to obtaining a quick test of employee wishes. It is a scheme which (so far at least) has been successful in: expediting the disposition of time-sensitive certification matters; simplifying a once complex process; and minimizing the costs to the parties and the public. While one should not judge the new system by its first few months of operation, the Board’s reading of the statute has facilitated quick votes; and that in turn has (so far) been accompanied by fewer unfair labour practice allegations, fewer formal hearings, and an apparent willingness to agree on bargaining unit descriptions and voter eligibility questions which were frequently the subject of litigation under the old system. And, of course, the basic building blocks of the system remain the same: employees must still organize themselves into “appropriate bargaining units” and, as before, a trade union cannot be “certified” as their bargaining agent unless it demonstrates that a majority of the employees in that bargaining unit have signified their desire to be represented - now by means of a vote. These fundamentals of the certification process have not changed.

50. In *R-Theta Inc.*, *supra*, a case that focused primarily on an alleged fraud on the part of the trade union, the Board commented as follows regarding the new certification procedures in the Act:

26. When Bill 7 was passed, the system was changed to one that is primarily vote based, although membership evidence is still essential for the entitlement to a vote (section 7(13)). And the statute gives quite specific directions about what information shall be relied on by the Board and at what stage in making its determinations. The system provides for a vote which is directed by the Board without holding a hearing (section 8(4)), based only on the information in the application for certification. That information relates to the appearance of membership of 40% of the employees in the bargaining unit proposed in the application and the accompanying membership evidence (sections 8(2) and (3)). If the Board considers it necessary in order to dispose of the application for certification, the Board may hold a hearing after the vote. However, in disposing of the application for certification, the Board is not permitted to consider any challenge to the membership evidence (section 8(9)).

27. As always, the Board is required to determine the appropriate bargaining unit for the application (section (9)). Then as a result of the vote, the Board is required to certify a trade union if more than 50% of the ballots cast by employees in the bargaining unit have voted for the union (section 10).

28. The combination of these legislative provisions describes a quick vote system for normal certification applications, where a hearing is not available prior to a vote being held. After the vote is held, a hearing is held only if the Board considers it necessary to dispose of the application. Even at this stage, litigation is restricted explicitly. The Board is not permitted to consider any challenge to the information provided under section 7(13), the names of union members and evidence as to their status as members. This is a significant change, as it was formerly the normal practice to dispose of challenges to the membership evidence before an application was determined. Now, the statute says the Board is not to do that.

29. And section 10 is quite specific as to what shall be done with the vote results. If the union receives more than 50% of the votes cast by employees in the bargaining unit determined to be appropriate, the Board shall certify. And if the union does not receive that level of support, the application is dismissed with a bar. It is section 10 which determines what issues are necessary to deal with prior to disposing of a certification application. They are the identification of the employees voting as ones within the bargaining unit which has been determined to be appropriate, and the ascertainment of the count.

30. The statute articulates certain exceptions to the “normal” route described above. These are in section 11. The Board may certify without a vote where the employer has contravened the Act and the results of that are such that the true wishes of the employees are not likely to be ascertained, no other remedy will suffice, and the union has adequate support for collective bargaining. And the Board may dismiss an application where the union has contravened the Act such that the true wishes of the employees do not or could not be ascertained and no other remedy, including the taking of another vote is sufficient. When either of these situations occur, the Board is not bound by the requirements of section 10 as to granting or dismissing a certification application. The situations of illegality in section 11 are the only exceptions to the entitlement of a union to certification after winning a representation vote as set out in section 10.

51. Section 7(13) of the current Act requires the union to file a list of the names of the union members in the proposed bargaining unit and evidence of their status as trade union members (i.e. membership cards). The Board then pursuant to section 8(2), reviews the information supplied by the union and determines whether forty percent or more of the individuals in the bargaining unit proposed by the applicant *appear* to be members of the union. Section 8(3) provides that the Board *shall* make the above determination with reference *only* to the information provided under section 7(13).

52. As was pointed out by the Board in *The Corporation of the City of Toronto, supra*, the decision to order the vote is, pursuant to sections 8(2) and 8(3) based on the assessment by the Board that forty percent or more of the individuals in the bargaining unit proposed by the applicant appear to be members of the union at the time the application was filed. Once that determination is made, there is nothing in the statute that directs the Board to determine the actual support of the union (such as was the case under the previous statute in the pre-hearing vote provisions). In fact, the opposite is true. I agree with the conclusion reached in *The Corporation of the City of Toronto, supra*, that the current Act is quite specific and that section 10(1) provides mandatorily that if the union wins the vote, in the absence of fraud as dealt with in section 64 or unfair labour practice allegations pursuant to section 11, the union “shall” be certified. Accordingly, the union’s victory in the representation vote is not subject to a review and assessment of its right to the vote in the first place, other than as set out below. If the legislature had intended to provide for that type of approach, it could have utilized language similar to the previous pre-hearing vote provisions. It did not do so.

53. It is also worth emphasizing the provisions of section 8(4) of the Act, which state that “the Board shall not hold a hearing when making a decision under subsection (1) or (2).” This further buttresses the conclusion that the Board’s determination under section 8(2) of the “appearance” of the

requisite level of support is not subject to challenge, except (as here) by way of a request for reconsideration of the original decision. However, consistent with section 8(4), even where reconsideration is requested, no hearing ought to be held to consider the matters raised in any reconsideration application and given the statutory scheme as described above, the Board will likely only reconsider where the Board has inadvertently committed some error in the initial decision.

54. The assessment by the Board, required by sections 8(2) and 8(3) of the Act of the appearance of membership support requires that the Board look at the quantum of support enjoyed by the union as well as the form of the membership evidence. The word “appear” applies to the Board’s review of the form of the membership evidence, as well as to the Board’s review of the amount of membership evidence submitted by the union. In other words, if the membership evidence submitted “appears”, in the opinion of the Board, to be evidence of membership in the applicant union, then the Board can rely upon it. Similarly, if it “appears” to the Board that forty percent or more of the individuals in the bargaining unit proposed by the applicant are members of the union, the Board shall direct a representation vote. This conclusion is reinforced by section 8(9) of the Act which specifically prohibits the Board from considering any challenge to the information supplied under section 7(13) of the Act.

55. As pointed out above, in this case there is a difference between the name used in the application and the name on the membership evidence. Both refer to the Union of Needletrades, Industrial and Textile Employees. However, the application refers to the “Ontario District Council” and the membership evidence refers to the “AFL-CIO-CLC”. The question on the ballot simply asks whether the individual wishes to be represented by the union. In these circumstances, the Board concluded in the February 12, 1997 decision that the membership evidence filed with the application was sufficient to meet the requirements imposed by section 8(2) of the Act. Assuming for the sake of argument that the applicant is a different entity from the entity whose name is on the membership cards, does that mean that the Board was wrong to conclude that “forty percent or more of the individuals in the bargaining unit proposed in the application for certification *appear* to be members of the union” pursuant to section 8(2) of the Act? Given the similarity between the two names in this case, I am satisfied that the membership evidence was sufficient to yield an “appearance” of forty percent support and that the Board’s decision was correct. This is not the situation referred to by counsel for the employer where the applicant is the Canadian Auto Workers and it submitted membership cards of the United Steelworkers of America. The two names in this case are very similar. In addition, as already noted, the Notice of Vote and of Hearing makes it clear who the applicant is and who the employees are therefore voting for or against. This notice is issued by the Board and posted in the workplace prior to the vote.

56. The Act makes it very clear that the representation vote now determines the outcome of the union’s application for certification, not the sufficiency and adequacy of the documentary membership evidence which enabled the union to get the vote in the first place. Accordingly, the challenge to the adequacy of the membership evidence and the motion to dismiss this application due to a failure to make out a *prima facie* case, which I have treated as requests for reconsideration, are hereby dismissed. I am not prepared to overturn the Board’s finding in the decision dated February 12, 1997 that forty percent or more of the individuals in the bargaining unit appeared to be members of the union.

The List Issues

57. The remaining issue to be dealt with is the eligibility to vote of Stephen Beagle, Susan Earhart, Russel De Souza and Nicole Lehman. As noted earlier, the parties are also in dispute with respect to the status of Mr. Grant O’Halloran, but it was agreed that this issue would be dealt with later, if it was still necessary to do so.

(a) Stephen Beagle and Susan Earhart

58. Stephen Beagle and Susan Earhart are classified as Team Leaders. In the application for certification filed on February 7, 1997, the union proposed a bargaining unit in which Team Leaders would be the first managerial exclusionary level. The proposed bargaining unit read as follows:

all employees of the Black Photo Corporation at 371 Gough Road (Head Office), save and except Team leaders and persons above the rank of Team Leaders, Office and Sales Staff (including on site store), Marketing, Accounting, MIS, Inventory and Purchasing Service and Mini Lab Operations Staff.

The employer's response filed on February 11, 1997 proposed the following bargaining unit description.

all employees of the responding party at 371 Gough Road, in the Town of Markham, save and except Team Leaders and persons above the rank of Team Leaders, office, clerical and sales staff.

Clarity Note: On site store staff, marketing, accounting, MIS, Inventory, Purchasing, Service, Blacks Express, Customer Service Smile Centre and mini lab operations staff are not included in the bargaining unit.

59. Upon reviewing the two proposed bargaining unit descriptions, it is apparent that the parties were in dispute with regard to whether or not staff employed in the Blacks Express and Customer Service Smile Centre should be included in the bargaining unit. However, there was clearly agreement that the Team Leaders should be excluded from the bargaining unit. On the Schedule "A" filed with the response, the employer included the names of Mr. Beagle and Ms. Earhart on the list of employees and indicated that their job classification was Team Leader.

60. In the pre-vote consultation, the responding party took the position that although classified as Team Leaders, Ms. Earhart and Mr. Beagle were not Team Leaders but lead hands. Accordingly, they should be included in the bargaining unit. It was agreed that all of the other individuals classified as Team Leaders were excluded from the bargaining unit. The applicant argued that Ms. Earhart and Mr. Beagle should be excluded from the bargaining unit as well. The employer maintained its position on the day of the vote and at the subsequent officer's meeting on March 5, 1997, as did the union. Therefore, it is the employer's position that although it has agreed that the managerial line of exclusion is Team Leaders, and despite the fact that Ms. Earhart and Mr. Beagle are classified and known to be Team Leaders, as these two individuals do not exercise managerial functions within the meaning of the Act they should therefore be included on the voters' list. Ms. Earhart and Mr. Beagle have cast ballots and their ballots have been sealed and segregated.

61. In correspondence leading up to the hearing, the parties articulated their positions with regard to Ms. Earhart and Mr. Beagle. The applicant in correspondence to the Board dated March 4, 1997 and March 7, 1997 articulated its position as follows:

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(b) Managerial Challenges

It is the position of the Applicant that Stephen Beagle, Susan Earhart, and Grant O'Halloran occupy the positions of Team Leader or above that position, and therefore are excluded from the bargaining unit. In fact, the Responding Party's own pre-vote documents and filings identify Beagle and Earhart as Team Leaders. The Responding Party is, therefore, precluded from taking an opposite position at the time of the vote. It is also the Applicant's position that these persons are not eligible to be in the bargaining unit pursuant to section 1(3)(b) of the Act.

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(b) Stephen Beagle and Susan Earhart

These two individuals were agreed by both parties to be Team Leaders on February 14, 1997. The Applicant and the Responding Party agreed, in writing, on February 13 and 14, 1997, and continue to agree, that Team Leaders are excluded from the bargaining unit. Notwithstanding the Responding Party's agreement to exclude these Team Leaders from the bargaining unit, the Responding Party now takes the position that they should not be excluded from the bargaining unit and should be allowed to vote. The basis for this is that although their titles are Team Leaders, and although they appear on the list of the Responding Party's employees as Team Leaders, they are not Team Leaders. It is the Applicant's position that this, too, is an example of the Responding Party resiling from agreements, simply for the purpose of attempting to gerrymander the voters list.

62. The employer's position as stated in its letter to the Board dated March 14, 1997 reads as follows:

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b. Stephen Beagle and Susan Earhart:

It has been the Respondent's position from the outset that the term "team leader" is a generic term that is recognized by management and the employees in reference to those persons who are employed in a managerial capacity at the lowest level. It has also been the position of the Respondent that Stephen Beagle and Susan Earhart although classified as team leaders by title, do not exercise managerial responsibilities within the meaning of 1(3) of the Act and are therefore not [sic] appropriate for inclusion in the bargaining unit. This position has been consistently maintained by the Respondent throughout the proceedings and this position was explained in detail to the Board officer at the first instance when the Board officer was attempting to obtain agreement on the various issues relating to the instant application. For this reason both Stephen Beagle and Susan Earhart were included on the employers' schedules that were filed with the Board at the very outset, furthermore it was explained to the Board officer as well as the Applicant prior to the counting of the ballots that the reason that Stephen Beagle and Susan Earhart were included on the schedules with the title team leader was because they did not exercise managerial functions within the meaning of the Act, that the title of team leader vis a vis Stephen Beagle and Susan Earhart was an anomaly and that their inclusion in the bargaining unit by the Respondent is based on the fact that they do not exercise managerial functions within the meaning of 1(3)(b) of the Act.

63. At the hearing, counsel for the applicant continued to take the position that as the parties had agreed that Team Leaders were excluded and as Ms. Earhart and Mr. Beagle were classified as Team Leaders, they were excluded from the bargaining unit. Counsel for the employer stated that it had been the company's position from the beginning that although these two individuals were called Team Leaders, they do not perform managerial functions and should be included in the bargaining unit. The other Team Leaders do perform managerial functions and should be excluded. In response, union counsel argued that either they are Team Leaders or they are not. They are on the list as Team Leaders and that's what they are. Company counsel cannot now argue, because the vote is close, that some Team Leaders are in the bargaining unit and some are out. In support of his position that the employer should not be allowed to resile from the parties' agreement with regard to Team Leaders, counsel provided the Board with the following decisions: *Saint Elizabeth Health Care - Durham Region*, [1996] OLRB Rep. Dec. 1008; *Airline Limousine Services Limited*, [1989] OLRB Rep. May 395; *Beresford Tavern*, [1989] OLRB Rep. May 405; *Laurent Lamoureux Co. Ltd.*, [1985] OLRB Rep. Nov. 1618; *Asea Brown Boveri Inc.*, (unreported decision, Board File No. 1787-92-R, Jan. 29, 1993); *Beaverbrook Estates Inc.*, [1990] OLRB Rep. Jan. 13; 795679 *Ontario Limited c.o.b. as G.G.'s Foodmart*, (unreported decision, Board File No. 2005-96-R, Dec. 5, 1996; *B & B Electric Co. Division of Electrobauer Systems Limited and/or Electrobauer Ltd.*, [1996] OLRB Rep. Dec. [907]; *Chedoke-McMaster Hospitals*, [1997] OLRB Rep. Feb. 35.

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64. The Board's jurisprudence makes it very clear that when the parties have agreed on a particular point or issue, they will not be allowed to resile from that agreement. The difficulty in this situation is determining whether or not the parties ever were in agreement with regard to the inclusion or exclusion of Ms. Earhart and Mr. Beagle.

65. It is not disputed that the bargaining unit proposed by both parties had as the first level of managerial exclusion the classification of Team Leader. However, on the Schedule "A" filed by the employer with its response, it included Mr. Beagle and Ms. Earhart on the list of employees. At no time did the employer sway from its position that all of the Team Leaders *except* Ms. Earhart and Mr. Beagle should be excluded from the bargaining unit.

66. The difficulty with the employer's position, is that if it felt Ms. Earhart and Mr. Beagle were not truly "Team Leaders" in the way in which that classification was utilized by both parties as the first line of managerial exclusion in the proposed bargaining unit descriptions, why was this position not set out in the clarity note which accompanied the employer's proposed bargaining unit description? It would have been a very simple matter to spell out clearly that the term "Team Leader" did not, in the employer's view, include Ms. Earhart or Mr. Beagle in the same manner as other groupings of employees were not to be included in the bargaining unit. As the company utilized a clarity note, it would have made sense to set out its position with regard to Mr. Beagle and Ms. Earhart at that point. There then could not have been any confusion as to the company's position.

67. On the other hand, it appears that although raised somewhat obliquely by the employer, i.e. in the Schedule "A" filed as opposed to in the clarity note to the bargaining unit description itself, there can be no doubt (nor did the union suggest that it was not aware) that from the beginning the employer's position has been consistent with regard to these two individuals.

68. Accordingly, I am not prepared to conclude that the parties have ever been in agreement with regard to these two individuals. As such, the employer is not resiling from any agreement. It is therefore appropriate to determine the issue of the inclusion or exclusion of Ms. Earhart and Mr. Beagle from the bargaining unit based on the merits.

69. There is another issue concerning the timeliness of the employer's particulars and submissions with regard to the individuals whose eligibility to vote and/or to be included in the bargaining unit is still in dispute. I will deal with that issue at the end of this decision.

(b) Russel De Souza and Nicole Lehman

70. It appears that Ms. Lehman and Mr. De Souza perform work in an area known as the Customer Service Smile Centre (CSSC). The dispute with regard to these two individuals is a tangled web.

71. At the outset, the responding party took the position that individuals employed in the CSSC and in the "Black's Express" should be treated in a similar fashion by the Board. It appears that the employer took the position that the CSSC employees shared a community of interest with the Office and Clerical staff and should be excluded from the bargaining unit. Therefore it was the position of the employer that both groups of employees, those employed in the CSSC and in the Black's Express, should be excluded from the bargaining unit. The applicant took the position that the CSSC positions should be included in the bargaining unit and the employees employed in the Black's Express should be excluded from the bargaining unit. Therefore at the time of the vote, on February 14, 1997, the union

was arguing for the inclusion of Ms. Lehman and Mr. De Souza in the bargaining unit and the employer took the position that they should be excluded.

72. On February 17, 1997, the union wrote the following letter to the Board:

Re: Union of Needletrades, Industrial and Textile Employees - Ontario District Council and Black Photo Corporation:

OLRB File No. 3612-96-R

With reference to the report from the Labour Relations Officer attending the voting on the above file on February 14, 1997, the union now agrees with the company position to exclude Nicole Lehman and Graham Scott from the list of challenged individuals.

Thank you for your attention to this matter.

Accordingly, at this point the union partially accepted the employer's position. It agreed that two individuals employed in the CSSC should be excluded from the bargaining unit. Presumably, the rest of that group of employees were to be included in the bargaining unit.

73. At the officer's meeting held on March 5, 1997, the company changed its position with regard to people employed in the CSSC and agreed with the union that those individuals should be included in the bargaining unit. The parties agreed that people employed in the CSSC would be included in the bargaining unit and that those persons employed in the Black's Express would not be included in the bargaining unit. However, the applicant argued that as it had agreed to the employer's challenge with regard to Ms. Lehman and Mr. De Souza and because these two individuals were not employees of the company and did not have a sufficient employment relationship with the company, that they should not be entitled to vote. The company took the position that as it had agreed to include in the bargaining unit persons employed in the CSSC, and Ms. Lehman and Mr. De Souza were employed in that area, that this meant that they were to be included in the bargaining unit. The company took the position that they did have an employment relationship with the company. In addition, the employer argued that the union could not raise a "new" challenge to these two individuals, namely that they were not employees, after the vote has been held.

74. In correspondence dated March 7, 1997, the union stated its position with regard to Ms. Lehman and Mr. De Souza as follows:

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(a) Russel De Souza and Nicole Lehman

At the vote on February 14, 1997, the Responding Party challenged these two individuals and asked that their ballots not be counted. The Responding Party took the position that these two individuals ought to be excluded from the bargaining unit and from the vote.

On February 17, 1997 and again on February 18, 1997, the Applicant advised the Board, in writing, that it agreed that Nicole Lehman and Russel De Souza should be excluded and their ballots not counted. That is, on February 18th, after reviewing the matter, the Applicant agreed with the Responding Party's position that these two persons should be excluded. After the Applicant agreed with the Responding Party that these two persons should be excluded, the Responding Party changed its position and now takes the position that these two persons should be included in the bargaining unit. This is clearly improper gerrymandering of the voters list.

The Responding Party, on March 5, 1997, should not be allowed to resile from its written position taken on February 14th and agreed to by the Applicant on February 17th. If the parties are allowed to continually reverse their positions in response to the opposite party's last position, the expedition of certification hearings will be impossible and the holding of regional certification meetings will

become futile. The Board has consistently enforced agreements made by the parties respecting employees in the bargaining unit and on the voters list, both under the old Act and the new Act (see *Airline Limousine Services Limited*, [1989] OLRB Rep. May 395; *Laurent Lamoureux Co. Ltd.*, [1985] OLRB Rep. Nov. 1618; *Beaver Brook Estates Inc.*, [1990] OLRB Rep. Jan. 13 (para. 8-9); *Asea Brown Boveri Inc.*, [1993] OLRB Rep. Nov. 314, Board File No. 1787-92-R applying *Lorne's Electric*, [1990] OLRB Rep. Sept. 935 and *Crown Electric*, [1978] OLRB Rep. April 344; 795679 *Ontario Ltd. c.o.b. as G.G.'s Food Mart*, [1996] OLRB Rep. No. 4732, Board File No. 2005-96-R; *B&B Electric Co.*, [1996] OLRB Rep. No. 4360, Board File No. 1831-96-R; *Chedoke-McMaster Hospitals*, [1997] OLRB Rep. No. 3935, Board File No. 2125-96-R; *St. Elizabeth Health Care*, [1996] OLRB Rep. No. 4496, Board File Nos. 2137-96-R and 2371-96-R).

As of February 17, 1997, there was a written agreement between the two parties to exclude these two individuals from the ballot and the bargaining unit. The Responding Party cannot resile from this agreement at any time after February 17, 1997.

In the alternative, and in the event the Board requires a hearing on the status of these two individuals, the Applicant takes the following position. These two individuals ought to be excluded on the basis that they are not employees of the employer or, alternatively, do not have a sufficient employment relationship to entitle them to vote. Russel De Souza is the son of Rosemarie De Souza, the Manger of Customer Service. On a casual basis, their parents may have obtained some work from them at the company at some time in the past. During the course of the organizing campaign, neither of these two individuals was at work. Neither of them has any continuing employment relationship with the Responding Party. Neither of them has performed any significant work in the past year for the company. In summary, neither of these individuals has an existing or continuing employment relationship with the Responding Party, and neither has performed sufficient amount of work on any kind of regular basis to justify these persons having any right to participate in the decision-making process of the employees in the bargaining unit.

75. The company, in correspondence dated March 14, 1997 took the following position:

a. The exclusion of Russel De Souza and Nicole Layman:

Russel De Souza and Nicole Layman are employed as part of a seven person customer service team known as the "Smile Centre". It was the Respondent's initial position that all employees of the Smile Centre be excluded from the bargaining unit insofar as there was a lack of community of interest between persons employed in the Smile Centre and the main lab. The Applicant's initial position was that all persons employed in the Smile Centre be included in the bargaining unit. At no time did the Respondent challenge the inclusion of Russel De Souza and Nicole Layman on the grounds that they did not have an employment relationship with the Respondent. Similarly, prior to the counting of the ballots the Applicant did not challenge Russel De Souza and/or Nicole Layman on the grounds that they did not have a sufficient employment relationship with the Respondent. It is only after the count was released that the Applicant by letter dated February 17, 1997 changed its position and raised the challenge vis a vis Russel De Souza and Nicole Layman that they did not maintain a sufficient employment relationship with the Respondent. In our respectful submission raising the challenge in this form is a *new* challenge raised by the Applicant subsequent to the counting of the ballots. Furthermore, in our respectful submission this is an attempt by the Applicant to resile from its position that persons employed in the Smile Centre are appropriate for inclusion in the bargaining unit. We are requesting that the Applicant be held to its initial position that any and all persons employed in the Smile Centre are appropriate for inclusion in the bargaining unit. Whether or not any person who was employed in the Smile Centre such as Russel De Souza and Nicole Layman did or did not have a sufficient employment relationship is a matter of fact that ought to be determined by the Board. If it is determined that Russel De Souza and Nicole Layman have an employment relationship with the Respondent then they as employees of the Smile Centre must be included in the bargaining unit as all other employees of the Smile Centre pursuant to the agreement of the parties that the Smile Centre employees are eligible for inclusion in the bargaining unit.

76. Therefore, to summarize, the company argued that all of the CSSC employees should be included in the bargaining unit. As Mr. De Souza and Ms. Lehman worked in the CSSC they were to be included in the bargaining unit. In addition, as the union had at no time on February 14, 1997 (the

date of the vote) or before challenged the employment status on Ms. Lehman or Mr. De Souza, they cannot now, after the vote has been held, raise a new challenge to these two individuals. While agreeing that the people employed in the CSSC should be included in the bargaining unit, the union argued that Mr. De Souza and Ms. Lehman should not be allowed to vote as they were not employees of the company. The union did not suggest that Ms. Lehman and Mr. De Souza would not have been included in the bargaining unit if they had had a sufficient employment relationship. But because they did not, they should not be allowed to vote. It was the union's view that Ms. Lehman and Mr. De Souza should be "out" because the parties had agreed on this and secondly because they did not have an employment relationship with the company.

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77. It was argued by the union that as it had, after the vote but prior to the hearing, accepted the position of the company with regard to Ms. Lehman and Mr. De Souza, that this should end the matter. However, the problem with this simple solution is that the union did not completely accept the company's position but wanted to agree to the exclusion of only two of the individuals employed in the CSSC. It still wanted the remaining individuals employed in the CSSC to be included in the bargaining unit. Had the union after the vote, changed its position and agreed to exclude all of the individuals in the CSSC (which was the company's position), then that agreement would likely have ended the issue. The union did not do that. The employer, after the vote, changed its view and the parties were able to agree that the employees in the CSSC (other than Ms. Lehman and Mr. De Souza) should be included in the bargaining unit.

78. The difficulty with the position taken by the union is that it wants it both ways. The union wants Mr. De Souza and Ms. Lehman off the list but the other CSSC employees to be on the list. The union wants a bargaining unit description which includes the employees in the CSSC except for Mr. De Souza and Ms. Lehman, who the union alleges for the first time after the vote has been held, do not have an employment relationship with the company. It would be a totally different situation if the union had taken the position from the beginning that the CSSC employees, other than Ms. Lehman and Mr. De Souza, should be included in the bargaining unit and had raised the issue of their employment status at or prior to the vote. The union did not do this but sought to put forward a new argument with regard to Ms. Lehman and Mr. De Souza, after their position with regard to the CSSC employees had been made at the vote.

79. The Board consistently encourages the settlement of issues that are in dispute between the parties. And the Board holds the parties to any agreements which may have been reached. Once the parties have agreed on an issue, the Board will not allow one side to resile from this agreement (see in this regard the cases referred to by the union in its correspondence set out in paragraph 60 of this decision). It has always been the approach of the Board to encourage and facilitate the settlement of matters in dispute between the parties.

80. However, in this case, I cannot conclude that the parties have "agreed" to exclude Mr. De Souza and Ms. Lehman and to include the other CSSC employees as was urged upon me by the union. At and prior to the vote on February 14, 1997, the union took the position that the CSSC employees should be included in the bargaining unit. The employer later agreed to this without attempting to make any exceptions. Accordingly, I am of the view that the parties have agreed that the appropriate bargaining unit description should include the Customer Service Smile Centre employees but have not agreed concerning the status of Mr. De Souza and Ms. Lehman.

81. The next issue therefore is whether or not the union should be allowed to change its position on Ms. Lehman and Mr. De Souza and to raise a challenge to the employment status of them after the vote has been held. Having taken the position at the vote that the individuals working in the CSSC

should be included in the bargaining unit, should the union be allowed afterwards to assert that all but two of these individuals should be included and change its position to challenge two people on the basis that they do not have an employment relationship? The union accuses the company of gerrymandering because it has agreed to include the CSSC employees in the bargaining unit. The employer accuses the union of gerrymandering because it now wants all but two of the CSSC employees to be included in the bargaining unit. In the circumstances, given that the parties were in dispute concerning the individuals employed in the CSSC at the time both parties changed their positions and that the ballots cast by these individuals had been segregated, it is difficult to conclude that in the face of those challenges there is any prejudice to the employer to allow the union to raise the issue of the employment status of Ms. Lehman and Mr. De Souza after the vote but prior to the hearing.

82. The Board's Rules of Procedure provide as follows with regard to the making of representations after a vote has been held.

41. Any party or person who wishes to make representations about the vote or the report must file those representations in writing promptly, and in any event within seven (7) days of the date the report was first posted. If a party or person wants an oral hearing, this request must be set out in the representations together with the reasons for the request in the way required by these Rules.

In addition, the Form T-36, Notice of Report of Board Officer stipulates in paragraph 2 as follows:

2. If you wish to make representations concerning any matter relating to the application for certification which remains in dispute, or any matter relating to the representation vote, the accuracy of the report, or the conclusions the Board should reach in view of the report, you must file a statement of representations with the Board which must include the following details:

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The notice also provides that submissions must be made within seven days of the date of the notice. In this case, the union notified the Board of its change in position with respect to Ms. Lehman and Mr. De Souza within that seven-day time frame.

83. As I have already pointed out at length, the new certification process found in the current Act provides for a "quick vote" in every case. The parties no longer have much time prior to the vote to research and analyze what position should be taken with regard to the eligibility of certain individuals to either vote or to be included in the bargaining unit. While normally the Board expects the parties to bring forward any challenges to the list and articulate the basis for the challenges before the vote is held, in this case the right to vote of Ms. Lehman and Mr. De Souza had already been challenged and their ballots segregated and not counted. So in a sense, while the basis for the challenge was "new", the fact that the status of these two individuals was in dispute was not new. In the circumstances, I am satisfied that the union raised its challenge to Ms. Lehman and Mr. De Souza as soon as it reasonably could. It is difficult to see in this case how it creates any prejudice to the employer to allow the union to add a "new" challenge to the ability to vote of individuals already in dispute. Therefore, I am prepared to allow the union to raise a challenge to the employment status of Ms. Lehman and Mr. De Souza. This matter remains to be litigated on its merits.

(c) List Issues - generally

84. There was one final issue with regard to the dispute concerning the list of employees. At the hearing, the counsel for the union argued that if the union was unsuccessful in its position that the Board should find that the parties were in agreement concerning whether or not Ms. Earhart, Mr. Beagle, Ms. Lehman and Mr. De Souza were or were not eligible to vote, then the Board in deciding the issue on the merits should determine the eligibility of the individuals to cast a ballot based on the

materials filed and submissions made prior to the hearing. The union, prior to the hearing and in accordance with the Board's Interim Information Bulletin No. 4 - Status Disputes in Certification Applications, filed submissions in support of its position on the merits regarding Ms. Lehman, Mr. Beagle, Ms. Earhart, Mr. De Souza and with regard to Mr. Grant O'Halloran, about whom there was no suggestion that the parties had ever reached agreement. The employer had only made relatively brief submissions articulating its position on the five individuals at the time of the hearing. Counsel for the union stressed the importance of the Board's Rules and Procedures and argued that the company should not be allowed to ignore them and should be precluded from filing materials and documents at the hearing. In support of his position, counsel referred the Board to *The McGill Club*, [1996] OLRB Rep. Oct. 877.

85. Counsel for the employer suggested that given the number of outstanding issues in this case, it was difficult to know what to file until the basis upon which the union was alleging that there was an agreement with regard to four of the five individuals still in dispute, was made clear. Counsel sought leave of the Board to file additional documents and submissions "down the road". Given the manner in which the hearing unfolded, this issue was left aside to be dealt with if necessary.

86. On March 20, 1997, two days after the conclusion of the hearing, the Board received a six-page letter setting out the submissions of the employer on the issue of the exclusions as well as a bundle of documents. The letter also contained brief submissions in response to the union's allegations in support of its section 11 complaint.

87. Naturally, the union objected to this late filing of submissions and documents. The union also suggested that it was completely improper for the company to have simply filed these documents prior to the Board's having ruled on the issue of whether or not the employer would be allowed to ignore the time frames set out in Interim Information Bulletin No. 4. In addition, the union suggested that it would constitute a denial of natural justice if I were to refer to the documents filed and submissions made after the hearing of these issues and render a decision in the preliminary matters based in any part on these materials.

88. In response, the company asserted that as the union had failed to comply with various time frames prior to the hearing, the Board should not consider any documents filed by the union. In addition, the company suggested that there was no prejudice to the union in this situation as the union will have ample time to respond to the submissions made by the company, as this matter has not yet been concluded.

89. I completely agree with the union that it would be improper for me to consider the submissions of the employer and the documents filed in determining the issues litigated on March 17 and 18, 1997. Accordingly, in reaching the conclusions that I have in this decision, I have not even reviewed the late submissions and documents filed by the employer, let alone relied on them in any way.

90. In the normal course, when there are issues still in dispute after the vote, one of the Board's Labour Relations officers meets with the parties at a post-vote meeting and encourages the parties to agree on a process to be followed at the hearing. This could include an agreement to leave certain issues aside until other issues have been dealt with, or an agreement to deal with certain issues in a certain order. Although the parties did not reach such an agreement in this case, it is difficult to dispute that there is little if any prejudice to the union to allow both parties to fully articulate at this point, with the appropriate documentation, their positions with regard to the *merits* of the dispute regarding whether or not the ballots cast by the five individuals should be counted.

91. Had what I have referred to as the “list issues” been the only issues in dispute at the time of the hearing and had the company failed to comply with Interim Information Bulletin No. 4 prior to the hearing, I would have taken a very different view. Given the number of issues in dispute and the possibility that the union’s “preliminary” arguments may well have succeeded, I am prepared to adopt a flexible approach in this case. However, a failure in the future to comply with the Board’s practices could result in a party being prohibited from filing materials in what is clearly an untimely fashion.

92. Accordingly, although the company should have waited for my ruling on this issue, I am prepared to afford both parties the opportunity to file any additional submissions or documents relevant to the issue of the status of the five individuals still in dispute.

93. Although the company has apparently already filed what it feels is relevant, it will nevertheless be given an additional five days from the receipt of this decision (which as the parties will be contacted and provided with an opportunity to come pick up this decision at the Board, should be the date of the decision) to file additional submissions and documents with the Board with a copy to counsel for the union and counsel for the group of employees.

94. Counsel for the union shall then have a further seven days to respond to any submissions and to file any documents felt to be relevant. The time frame under which the union must respond may be extended if it is necessary to deal with a request for documents.

95. Upon the receipt of the additional submissions and documents, if any, the Board shall determine the appropriate next step. If necessary, a hearing may be scheduled to deal with the issue of the status of the five disputed individuals. However, if it is appropriate to do so, the Board may determine the status issues based on the written materials and submissions of the parties. Depending on the outcome of the list issues, it may or may not be necessary to deal with the union’s application pursuant to section 11 of the Act. Accordingly, at this point, it is appropriate to continue to leave this issue aside until the list issues have been dealt with on their merits.

96. If any of the parties feel that it may be helpful to meet with a Labour Relations Officer at this point, a request to the Manager of Field Services may be made.

97. I shall remain seized of this matter.

0402-95-U National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Applicant v. Davis Martindale and Company Inc., Coopers & Lybrand Limited, **Canadian Imperial Bank of Commerce**, North American Trust Company, Allstate Insurance Company of Canada, Charles R. McDonald, William Pascoe, Clifford N. Sutts, Aric J. Rusk and BDO Dunwoody Limited, Responding Parties

Interference in Trade Unions - Unfair Labour Practice - Union asserting that employer deducted dues totalling \$35,000 from employees which were never remitted to union - Employer placed in receivership and later declaring bankruptcy - Union filing unfair labour practice complaint against various receivers and secured creditors of employer and claiming that they have interfered in administration of union by failing to remit dues already deducted from employees - Board not satisfied that respondents fairly characterized as “persons acting on behalf of employer” - Board also concluding that unremitted dues amounting to “claim provable in

bankruptcy” within meaning of Bankruptcy and Insolvency Act (BIA), and that union’s application barred by section 69.3 of BIA - Union’s unfair labour practice complaint dismissed

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *J. A. Rundle* and *D. A. Patterson*.

APPEARANCES: *Frank Luce* and *Fred Lamont* for the applicant; *Harry Freedman* and *Mark Crestohl* for CIBC and *Davis Martindale*; *George W. King* for Clifford N. Sutts; *Edward W. Ducharme* for Aric J. Rusk, William Pascoe and Charles R. McDonald.

DECISION OF THE BOARD; May 16, 1997

1. This is an application pursuant to the provisions of section 96 of the *Labour Relations Act, 1995*. By order of a decision of the Board (differently constituted) dated September 6, 1995, a hearing was held in this matter to rule upon various preliminary matters, including the objection raised by the responding parties that the application does not disclose a *prima facie* case and that the Board does not otherwise possess the requisite jurisdiction to entertain this matter. Argument in the matter proceeded on the basis of the facts stipulated in the applicant’s materials as clarified by the parties at the hearing.
2. The responding parties are each receivers or secured creditors of a company known as Windsor Plastic Products Limited, which was placed into receivership on December 23, 1994, and which declared bankruptcy in the following year. The applicant trade union had entered into a collective agreement with Windsor Plastic Products Limited which was effective until February 7, 1995.
3. Under the provisions of Article 14 of that agreement, the employer is required to deduct union dues and initiation fees from employees’ paycheques on the second and fourth weekly pay period of each month. The agreement provides that, thereafter, the employer is to remit such monies to the trade union by no later than the fifteenth day of the following month. It appears that although the monies were deducted from the paycheques of the approximately 450 employees in November and October of 1994, no corresponding remittances were ever made to the union. The company ceased operation in late December, 1994, when its assets were dispersed and liquidated upon the institution of a receivership. The union’s subsequent efforts to obtain the remittances from the various receivers or creditors proved to be unsuccessful.
4. The union claims that the various receivers and secured creditors of WPP, by failing to remit these monies, totalling some \$35,000.00, have interfered in the administration of a trade union and have therefore violated section 70 of the *Labour Relations Act, 1995*. In this respect, it was argued that the failure to remit dues deducted by an employer in such circumstances has been recognized as a breach of the Act (*Re Truck Engineering Limited*, [1978] OLRB Rep. Jan. 70) and that the relationship as between the trade union and the employer in respect of this property was one of trust. Further, it was argued that the respondents, in assuming their roles of receivers or secured creditors, had established a complex series of fiduciary relationships with the employer and, in that respect, ought to be considered as persons acting on behalf of the employer within the meaning of section 70 of the *Labour Relations Act, 1995*.
5. There was broad agreement between counsel at the hearing, and shared by this panel of the Board, that counsel for the applicant presented numerous subtle and novel arguments in support of the union’s claim. While we accept the submission of the trade union that such subtlety and novelty in itself ought not to be grounds for rejection of a claim, at the same time we do not consider them to be factors militating in favour of its acceptance. The Board notes that, fundamentally, the union’s application is one in which a sum of money is being sought from creditors and receivers in the wake of a bankruptcy and that, aside from the recovery of that sum, which is in no sense insubstantial, the application does

not seek the resolution of a labour relations issue in any ordinary sense of the word. In this regard, we are not satisfied that the respondents in this case can fairly be characterized as “persons acting on behalf of an employer” as it is contemplated within the language of section 70. For that reason, we accept the responding parties’ objection that the application does not disclose a case for them to answer even if all the facts asserted by the trade union are accepted as true.

6. Even if we are wrong in our determination in this respect, it is apparent to the Board that the matter of the recovery of claims arising out of a bankruptcy has been expressly dealt with statutorily by the Federal Parliament, which has established a scheme under which a multiplicity of proceedings is to be avoided by channelling all possible claims into bankruptcy court. (*R. v. Fitzgibbon* (1990), 78 C.B.R. 193 (S.C.C.)) In this regard, and having carefully considered the parties’ submissions in relation to this matter, we are satisfied that the present application constitutes a “proceeding” within the meaning of section 69.3 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), which provides in relevant part as follows:

... on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor’s property or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

The Board notes in this respect that section 121 of the *BIA* stipulates that any debts and liabilities to which the bankrupt is subject as of the date of the bankruptcy or to which he may become subject by reason of an obligation incurred prior to the date of the bankruptcy shall be deemed to be “claims provable in bankruptcy”.

7. With this in mind, we conclude that the dues collected by Windsor Plastic Products, but not remitted to the trade union, is, in the language of section 121 of *BIA*, a “liability to which the bankrupt is subject” and therefore, a “claim provable in bankruptcy” within the intended meaning of section 69.3 (1). Accordingly, the present application appears to be caught by the prohibition against proceedings seeking recovery of claims provable in bankruptcy set out in that latter section.

8. Having regard to the foregoing, the Board considers these to be appropriate circumstances in which to exercise the discretion granted to it under section 96 of the *Labour Relations Act*, 1995 to not inquire into an application. Therefore, the application is dismissed.

3690-96-R Canadian Health Care Workers, Applicant v. The Corporation of the City of St. Thomas, Responding Party v. London & District Service Workers’ Union, Local 220, Intervenor

Certification - Hospital Labour Disputes Arbitration Act - Timeliness - Canadian Health Care Workers seeking to displace London & District Service Workers Union, Local 220 as bargaining agent for certain employees - Most recent collective agreement between employer and incumbent union expired in 1992 - Board of Arbitration issuing award covering January 1, 1993 to December 31, 1994 period in January 1997 - Award dated November 1996 - Award remitting lay-off issue to parties for further negotiation and Board of Arbitration remaining seized - Whether certification application timely under provisions of HLDAA - Board finding that award not deciding matters in dispute and that 90 day extension under subsection 10(12) of HLDAA not yet triggered - Certification application dismissed as premature and untimely

BEFORE: M. A. Nairn, Vice-Chair, and Board Members J. A. Rundle and D. A. Patterson.

APPEARANCES: *E. Coetzee* for the applicant; *Steven Wilson* for the responding party; *Stephen Krashinsky* for the intervenor.

DECISION OF THE BOARD; June 4, 1997

1. This is an application for certification. The applicant (the "C.H.C.W.") is seeking to displace the intervenor ("Local 220") as bargaining agent for a bargaining unit of employees of the responding party (the "employer"). A vote was held on February 21, 1997 and the ballot box sealed pending determination of certain issues in dispute.

2. At the hearing the parties confirmed that the only remaining issue requiring determination by the Board prior to any counting of the ballots was the issue of the timeliness of the application. (Minutes of Settlement have been filed with respect to other issues and the applicant has been found to have trade union status in Board File No. 3586-96-R). We heard the parties' evidence and submissions on the timeliness issue. The facts were not in dispute. There is also no dispute that, pursuant to section 7(4) of the *Labour Relations Act, 1995* (the "Act"), the applicant is entitled to bring an application for certification on the commencement of the last two months of operation of the collective agreement. The problem in this case is how to calculate that open period given the facts and the particular provisions of the *Hospital Labour Disputes Arbitration Act* (the "HLDAA") that apply in the circumstances.

3. Local 220 currently holds bargaining rights for the employees subject to this application. The members of the bargaining unit are employed by the City of St. Thomas at Valleyview Home for the Aged and collective bargaining is subject to the HLDAA. The most recent collective agreement between those parties expired on December 31, 1992. Following direct negotiations, a conciliator was appointed on April 11, 1995 and a Board of Arbitration was constituted pursuant to the terms of the HLDAA (the "interest arbitration board"). A hearing was held and an award was issued to the parties (the "Barton award"). That award covers the period January 1, 1993 to December 31, 1994.

4. The parties filed an agreed statement of fact as follows:

1. On or after January 13, 1997, counsel for the Employer received a copy of a decision of Arbitrator P. Barton.
2. The covering letter from Barton Arbitrations Inc. was dated January 13, 1997.
3. The signature page of the Barton decision stated:

"DATED AT London, Ontario this day of November, 1996."
4. Counsel for the Employer was subsequently advised that Arbitrator P. Barton had orally directed the parties to insert the number "26" so that the signature page of the Barton decision now stated:

"DATED AT London, Ontario this 26th day of November, 1996."

5. Submissions were made to the interest arbitration board concerning changes to the lay-off and recall language in the existing collective agreement. In its award the interest arbitration board dealt with that issue as follows:

A considerable part of the briefs of both parties was addressed to changes in the lay off and recall language of the Agreement. Such things as redefining the meaning of seniority, notice to the Union, notice to employees, the right to bump up or the right to bump down, competition or threshold clauses, length of recall, recall for temporary jobs, were considered. Although the Union proposed that much of the layoff and recall language be that of Mitchnick in 1992, in fact the Union proposal did not mirror Mitchnick and made some changes to it. The Board feels that additional job security,

such as was granted by Mitchnick, is something to which these employees are entitled. The Board is not satisfied that the variations from Mitchnick proposed by the Union here are warranted. On the other hand, we are not satisfied that specific Mitchnick language fits this bargaining unit. It is not for us to draft language. As a result we Award that the parties meet and draft appropriate language consistent with the principles of the Mitchnick Award on this issue and that this process be finished within 90 days following the release of the Award. We remain seized of this issue and others which may arise during the implementation process.

6. At the time this application was filed, Local 220 and the employer had not negotiated or agreed on any lay-off and recall language nor had the matter been remitted to the interest arbitration board for determination. No collective agreement has been signed. This application was filed on February 11, 1997.

7. We also heard evidence from Mr. Lloyd Fennell, Director of Personnel and Human Relations for the City of St. Thomas. He is responsible for the administration of collective agreements. He received the Barton award on or about January 23, 1997. It provided for the retroactive payment of wages within 45 days "from the release of the Award". The parties agreed to treat the date of release as January 13, 1997. This was done without any input from the interest arbitration board. Mr. Fennell acknowledged that he had no information as to when the interest arbitration board (or a majority thereof) made its decision.

* * *

8. The relevant provisions of the HLDAA provide:

- 6 (16) The board of arbitration shall determine its own procedure but shall give full opportunity to the parties to present their evidence and make their submissions.

• • •

- 9 (1) The board of arbitration shall examine into and decide on matters that are in dispute and any other matters that appear to the board necessary to be decided in order to conclude a collective agreement between the parties, but the board shall not decide any matters that come within the jurisdiction of the Ontario Labour Relations Board.

• • •

- (2) The board of arbitration shall remain seized of and may deal with all matters in dispute between the parties until a collective agreement is in effect between the parties.

• • •

- 10 (1) Where, during the bargaining under this Act or during the proceedings before the board of arbitration, the parties agree on all the matters to be included in a collective agreement, they shall put them in writing and shall execute the document, and thereupon it constitutes a collective agreement under the *Labour Relations Act*.

• • •

- (3) Where, during the bargaining under this Act or during the proceedings before the board of arbitration, the parties have agreed upon some matters to be included in the collective agreement and have notified the board in writing of the matters agreed upon, the decision of the board shall be confined to the matters not agreed upon by the parties and to such other matters that appear to the board necessary to be decided to conclude a collective agreement between the parties.

- (4) Where the parties have not notified the board of arbitration in writing that, during the bargaining under this Act or during the proceedings before the board of arbitration, they

have agreed upon some matters to be included in the collective agreement, the board shall decide all matters in dispute and such other matters that appear to the board necessary to be decided to conclude a collective agreement between the parties.

(5) Within five days of the date of the decision of the board of arbitration or such longer period as may be agreed upon in writing by the parties, the parties shall prepare and execute a document giving effect to the decision of the board and any agreement of the parties, and the document thereupon constitutes a collective agreement.

(6) If the parties fail to prepare and execute a document in the form of a collective agreement giving effect to the decision of the board and any agreement of the parties within the period mentioned in subsection (5), the parties or either of them shall notify the chair of the board in writing forthwith, and the board shall prepare a document in the form of a collective agreement giving effect to the decision of the board and any agreement of the parties and submit the document to the parties for execution.

(7) If the parties or either of them fail to execute the document prepared by the board within a period of five days from the day of its submission by the board to them, the document shall come into effect as though it had been executed by the parties and the document thereupon constitutes a collective agreement under the *Labour Relations Act*.

(8) Except in arbitrations under section 8, the date the board of arbitration gives its decision is the effective date of the document that constitutes a collective agreement between the parties.

(9) The date the board of arbitration gives its decision under section 8 upon matters of common dispute shall be deemed to be the effective date of the document that constitutes a collective agreement between the parties.

• • •

(11) Despite the provisions of subsection (10) and except where the parties agree to a longer term of operation, a document that constitutes a collective agreement shall cease to operate on the expiry of a period of two years,

- (a) from the day upon which notice was given under section 14 of the *Labour Relations Act*; or
- (b) from the day upon which the previous collective agreement ceased to operate where notice was given under section 54 of the *Labour Relations Act*.

(12) Where under subsection (11), the period of two years has expired on or will expire within a period of less than ninety days from the date the board of arbitration gives its decision, the document that constitutes a collective agreement shall continue to operate for a period of ninety days from the date the board of arbitration gives its decision for the purposes of subsection 5(4), subsection 54(1) and subsection 58(2) of the *Labour Relations Act*.

9. We start with subsection 10(12) of the HLDAA. There was no dispute that it was applicable here. The parties were also generally agreed as to how subsection 10(12) of the HLDAA is intended to operate, accepting the Board's reasoning in *The Metropolitan General Hospital* [1991] OLRB Rep. April 547. The purpose of the subsection is to create an open period. It does so by extending the expiry date of a collective agreement when that agreement would otherwise have already expired by the time the interest arbitration board gives its decision. It extends the expiry date for 90 days from the date the board of arbitration gives its decision. By operation of subsection 7(4) of the Act (for our purposes) an open period exists during the last two months of that extended period, preserving the opportunity for the filing of a certification application by another trade union.

10. The subsection specifically contemplates the all too common delays in the negotiation and interest arbitration process. The employees affected rarely have a current collective agreement in place. Rather, their day to day lives are regulated by the terms of an expired agreement that has become subject to freeze provisions. They then see certain retroactive adjustments, and the cycle begins again. In cases where the resulting collective agreement has already expired, so too, any open period would have expired. That result is anathema to the policy concerns underlying subsections 7(4)-(6) and subsection 62(2) (and to a mixed degree, subsection 67(1)) of the Act, which contemplate an ascertainable and regular opportunity for employees or other trade unions to challenge an incumbent trade union's bargaining rights. Subsection 10(12) thus enables an "artificial" open period to be created, preserving the opportunity for employees or competing trade unions to challenge existing bargaining rights either through either a termination application or a certification application.

11. The negotiation and interest arbitration process at issue here was to effect the renewal of a collective agreement that expired on December 31, 1992. That renewal was for a period of two years. There is no dispute that, pursuant to subsection 10(11) of the HLDAA, the collective agreement resulting from this process was to expire on December 31, 1994. By the time of the award, any collective agreement resulting from the process had expired.

12. The difficulty arises in applying these provisions to the particular circumstances of this case. The applicant became aware of the interest arbitration award dated November 26, 1996. It treated the 90 days as commencing to run from that date. It filed its application for certification on February 11, 1997, believing that to be within the last two months of the operation of the collective agreement. On the applicant's theory, its application is timely.

13. Local 220, supported by the employer, takes the position that they are still in the throes of the interest arbitration process by the terms of the Barton award. They argue that the award dated November 26, 1996 is an interim award and is not final. Local 220 also argues that, in the words of subsection 10(12) there is no "document constituting a collective agreement". In either case therefore, the 90 day period has not yet started to run. It will not start, in their view, until the parties deal with the lay-off and recall issues either through negotiations or by returning to the interest arbitration board to have that matter determined, and if necessary, to prepare the document that becomes the executed collective agreement.

14. In addition, Local 220 argues that even if the award is final, the 90 day period runs from January 13, 1997, not November 26, 1996. Therefore the application filed is premature and untimely, as it does not fall within the last two months of the operation of the agreement.

15. The parties also take issue with the appropriate method of calculating both the 90 day period and the two month period under the respective statutory provisions.

* * *

16. We will deal first with the issue of whether there must be a "document constituting a collective agreement". In our view there need not be a collective agreement in existence in order for subsection 10(12) to apply. What is required is the information necessary to be able to determine the expiry date of any document that would constitute the collective agreement. Subsections 10(6)-(7) do provide a mechanism whereby one or both parties to the arbitration process can require the interest arbitration board to prepare the written collective agreement resulting from the process and, if necessary, deem its execution by operation of the statute. However those are not necessary steps in order to determine the expiry date.

17. Subsection 10(11) provides (for our purposes here) that the document that constitutes the collective agreement shall cease to operate on the expiry of two years from the expiry of the predecessor collective agreement. That was not in dispute here; the predecessor collective agreement expired December 31, 1992. The collective agreement arising from this interest arbitration process expired on December 31, 1994. Subsection 10(12) provides that where (as here) that two year period has expired by the time of the award, the document that constitutes a collective agreement shall continue to operate for a period of 90 days. In order to accomplish the purpose of subsection 10(12) there is no need to have an executed collective agreement.

18. There are good reasons for this. The driving policy consideration in subsection 10(12) is to provide clarity and certainty to all parties potentially affected. That includes employees and trade unions not party to the interest arbitration process who have no way of ascertaining the relevant time periods except through public documents and the application of applicable law. In order to create the collective agreement one or both of the parties to the bargaining relationship must act in response to the award of an interest arbitration board. Should both parties be content of their obligations without the need for that document, and yet one was required by subsection 10(12), no open period would arise. Even if the parties did act at some stage to create a document there is nothing to ensure that interested others would be able to pinpoint the relevant dates for making any necessary calculations as to the open period. Finally, on this theory, the parties to the agreement could act together to prevent any opportunity to challenge the existing bargaining rights.

19. In this case therefore, for purposes of subsection 10(12), the two year period of the collective agreement has expired (on any calculation) and the document that constitutes the collective agreement is to continue to operate for a period of 90 days from the “date the board of arbitration gives its decision”. What is meant by the “date the board of arbitration gives its decision”? This gives rise to two issues; first, when does an arbitration board “give” its decision and second, when has an arbitration board given “its decision”, or, to put it another way, what constitutes the “decision”?

20. Given our finding as to what constitutes the “decision”, the issue of when the interest arbitration board “gives” that decision does not arise in this case. However we do feel some comments are warranted. The applicant argued that the date of the award, November 26, 1996, was the ascertainable and therefore appropriate date. The employer and Local 220 relied on the date that the decision was forwarded to them, January 13, 1997. They rely on the term “gives” according to its common meaning as including an element of transmission or communication.

21. Either interpretation presents a certain difficulty in accomplishing the objective of the subsection. In order to be able to calculate the 90 day extension, third parties must be able to rely on a clear and ascertainable date. The date of the award without doubt provides a greater degree of certainty and clarity. It is more readily ascertainable by third parties. It is the public document. Third parties do not have ready access to, and ought not to be required to somehow seek out a date found in private correspondence.

22. On the other hand the subsection contemplates that there be an extension of 90 days and a corresponding full two month open period. Applying the date of the award in circumstances where the award is not forwarded in a timely way risks reducing or altogether foreclosing an open period. Both concerns affect the third party interest that is sought to be protected by the subsection, and in that sense interpreting the subsection incorporates an element of assessing the “lesser of two evils”.

23. It is incumbent on the interest arbitration community to be aware of the rights that flow from an interest arbitration award. These are not just the immediate collective bargaining rights; they include additional statutory rights. In recognizing that third party interests are also affected by the timing and character of an award, an interest arbitration board can act to reduce if not eliminate conflict

or confusion arising out of the attempted exercise of those statutory rights. For example, where a dissent to an award is anticipated, the majority of the interest arbitration board can consider whether to release the award in a timely way with a dissent to follow or be content to delay the date of the award until the dissent is released concurrently. It may be the rare occasion when the date of the award differs significantly from the date the award is forwarded to the parties. Of course, no issue arises when those dates are the same.

24. Where the dates differ by only a few days, the concern for clarity and ascertainability is likely to outweigh the concern for the provision of a full 90 day period, given that a full open period of two months would still flow. As noted in *The Metropolitan General Hospital, supra*, decision, the open period will be a direct function of the “date of the arbitrator’s award” (at paragraph 24). Although not specifically addressed that conclusion is also implicit in the Board’s decision in *Chateau Gardens Queens* [1992] OLRB Rep. Aug. 906, (see paragraph 40) a decision involving Local 220. In other words, there may be a strong presumption in favour of the date of the award.

25. The issue of clarity becomes more important in the context of the introduction of subsection 7(10) of the Act. That subsection imposes a mandatory bar on an applicant which withdraws its application after a representation vote is taken. In the current certification scheme requiring five day votes, a vote will almost always have been held prior to any consideration by the Board of the timeliness issue. So if an applicant recognizes during that process that it may be mistaken as to the appropriate date it is arguable based on that statutory language that an applicant is barred and cannot withdraw and re-apply in a timely way. (A consequence probably not intended by the statute but against which the Board has no authority to relieve).

26. A bar will not operate where the Board dismisses the application because it is untimely. (The mandatory bar under subsection 10(3) of the Act arises where the application has been dismissed because of insufficient support for the applicant shown through the vote results). However, depending on the variation in the dates, by the time the Board is able to render a decision the open period may well have passed, again foreclosing an opportunity to re-apply in a timely way. An applicant can “buffer” its opportunity to exercise its right to challenge an incumbent by filing multiple applications but ultimately at the expense of the parties and the Board in responding to them. So, there is good reason to seek to avoid these possible consequences arising out of confusion over the date that the interest arbitration board “gives” its decision.

27. Finally, in this case the fact that the parties to the interest arbitration award agreed that its “date of release” for purposes of the payment of retroactivity was January 13, 1997 is of no assistance. That date provided for the amount of time that the employer would have available to make the necessary calculations and produce cheques with itemized statements. As a practical matter, 45 days from November 26, 1996 had already expired when the employer was informed of its obligation, and a suitable period was required in order to complete the work. So, sensibly, the parties agreed to a period of 45 days from January 13, 1997. That cannot affect the statutory determination of the open period.

28. We turn then to the issue of what constitutes the interest arbitration board’s “decision”. Local 220 and the employer argue that the November 26, 1996 award is an interim award. They assert that it is incumbent on the interest arbitration board to resolve all matters remaining in dispute between the parties. They rely on the award they received which directed them to continue to negotiate, failing which, to return to the board in order that it could finalize its award. Any operation of subsection 10(12) is, on this theory, not precluded, but postponed. In support of this position, Local 220 argues that a review of section 10 of the HLDAA confirms that no collective agreement can come into effect until all matters in dispute have been determined.

29. Local 220 also poses this concern. If the interest award were treated as a final award, and issues of lay-off and recall arose in the workplace, what would the union grieve? There would be no settled language for a rights arbitrator to interpret in order to determine the parties' interests. In that regard it relies on an arbitration decision of a board chaired by D. Fraser, *Durham Memorial Hospital*, unreported, dated March 25, 1991.

30. Local 220 also argues that it is contrary to the policy discussed in *The Metropolitan General Hospital*, *supra*, to create an open period and allow a trade union to bring a displacement application at the same time that the incumbent union is trying to negotiate the matters remitted to the parties. Such a result does not promote the completion of the collective agreement nor does it allow the employees an opportunity to review the terms of the new agreement and enable the incumbent union an opportunity to satisfy any concerns about its efforts.

31. The employer notes subsection 6(16) of the HLDAA that gives the interest arbitration board the right to determine its own procedure. It submits that it appears that the interest arbitration board in this case determined that a two-step procedure was appropriate. Counsel argued that if the award was a final award then, pursuant to subsections 10(5)-(7) one or other of the parties could request that the interest arbitration board incorporate its direction that the parties meet and negotiate language in accordance with certain principles as part of the collective agreement document. The effect of that would be to create a "mini-arbitration" pursuant to a rights arbitration process (under the Act) rather than an interest process (under the HLDAA), a result not in keeping with the intention of either statute.

32. In response, the C.H.C.W. argues that the award must be treated as a final award. Treating it as an interim award could act, it argues, to prevent an open period from arising in the following way. The award gives the parties 90 days in which to negotiate language. If the parties are successful and enter into an agreement concerning the lay-off and recall language on the ninetieth day, two things would occur. First, the interest arbitration award would become final on a kind of retroactive basis, as there would no longer be any outstanding issue to remit to the board. As a final award, the 90 day period under subsection 10(12) would run from the date of the award. The open period would fall within the last two months of that 90 day period giving rise to the second event - the open period would expire on the same day that the parties settled their agreement, thereby foreclosing any opportunity to bring an application challenging the incumbent's bargaining rights.

33. The applicant also submits that it is the *prior* collective agreement that is extended in order to allow for a displacement application. Given that we reject this argument, we need not deal with Local 220's argument that it is inappropriate for us to consider the submission, it being received after the hearing. Briefly, on a reading of section 10 as a whole that position cannot prevail. All references to the "document constituting the collective agreement" are in reference to the collective agreement that results from the negotiation and interest arbitration process. These provisions apply equally in the case of a first collective agreement as well, where there is no previous collective agreement that could be extended. A prior collective agreement would have long since expired and its terms continued only as a result of the application of the freeze provisions.

34. In reply the employer suggested that the unique circumstances in this case, including the hypothetical possibility that by action of the parties an open period might be foreclosed, was not something contemplated by the legislation and represents a shortfall in the statute. Further, that interest arbitration boards may need to be advised of the possible consequences of making the kind of direction as is contained in this award, but that does not affect the interim nature of the award.

35. Rather than characterizing the issue as one of the "interim" or "final" nature of the award, the obligation of the interest arbitration board is described in section 9 of the HLDAA; to decide on matters that are in dispute. Subsections 10(3) and (4) recognize that the parties may or may not have

agreed to certain issues and that any agreed to matters are precluded from consideration by the interest arbitration board. The issue is, does the November 26, 1996 award decide matters in dispute between the parties?

36. In *Durham Memorial Hospital, supra*, the union brought six grievances respecting the retroactive application of vacation entitlement and shift premium arising out of an award of an interest arbitration board constituted pursuant to the HLDAA. The award provided for improvements over the predecessor collective agreement. The parties disagreed however as to the effective date of the changes. The union took the position that they were retroactive to the commencement of the collective agreement. The employer was of the view that they took effect as of the date of the interest award, some two years later.

37. No collective agreement had been signed following the release of the interest award, nor had either of the parties utilized the procedure under subsections 10(6)-(7) of the HLDAA to have the document prepared and deemed executed. The employer had implemented other aspects of the award and had sought clarification on the issue of retroactivity from the interest arbitration board. In the absence of the union's consent, the interest board declined to provide clarification.

38. At the outset of the rights arbitration the employer took the position that the arbitration board had no jurisdiction to consider the grievances as no collective agreement was in effect between the parties. The arbitration board concluded that it had no jurisdiction to determine the grievances, on the basis that no "new" collective agreement existed. The arbitration board found that the prior collective agreement and the interest award did not constitute a collective agreement pursuant to which a grievance could be heard. The board acknowledged the right of the union to grieve under the terms of the "old" collective agreement.

39. It is apparent that the found inability of the union to grieve under the new terms provided for by the interest award in *Durham Memorial Hospital, supra*, did not arise because of the nature of the award. It arose because there was not a collective agreement (incorporating those new provisions) in effect between the parties, from which the rights arbitrator would take jurisdiction. The terms of the parties' relationship were still governed by the freeze.

40. Contrary to the concern posed by Local 220 there is no lost opportunity to grieve. Even according to *Durham Memorial Hospital, supra*, Local 220 would continue to be able to grieve matters of lay-off and recall, but pursuant to the terms of the expired collective agreement, (and any agreed to changes) continued by virtue of the freeze under section 13 of the HLDAA. Until such time as the parties have executed a collective agreement incorporating the interest award, the right to grieve arises not from the "new" collective agreement, but from the terms of the freeze, including the grievance and arbitration provisions contained therein. Subsection 86(3) of the Act applies and any allegation of a violation of the freeze may be referred to arbitration, or pursued at the Board. While there may be an issue as to what is caught by the freeze at various stages up to the execution of the "new" collective agreement, a rights arbitrator has jurisdiction to determine that issue and whether the freeze has been violated. As a practical matter, the issue may not often be characterized as such. The parties may simply agree that, notwithstanding no executed collective agreement, their obligations under the freeze include terms set through the interest award where the parties have implemented them, for example, the payment of wages. The "content" of what is frozen can change with the parties' consent. *Durham Memorial Hospital* simply concludes that the union could only pursue rights maintained by the freeze. In this case the lay-off and recall language has been remitted to the parties for negotiation, and to that extent it extends the operation of the freeze. Whatever else it may speak to, the decision in *Durham Memorial Hospital* does not assist us in determining whether the Barton award dated November 26, 1996 determines the matters in dispute between the parties.

41. Local 220 argued that it made poor labour relations sense to have an open period while negotiations were continuing. As a general proposition we agree. That is one purpose of generally having the open period fall at the end of a collective agreement. The employees have been able to experience the advantages or disadvantages of the terms of that agreement and the union's representation of their interests both in negotiations and in the administration of the agreement. However a union may well have to defend its bargaining rights at the same time that it is engaged in negotiations for the renewal of the agreement, for example in circumstances where negotiations occur in advance of, or at the time of the agreement's expiry. That possibility is also contemplated in section 67 of the Act either prior to conciliation or mediation or, depending on the circumstances, at various later stages of negotiations. The provisions of the HLDAA reduce that likelihood for unions subject to its terms, but there is no necessary policy reason to conclude that the possibility is eliminated. We note for example that had the parties entered into a five year collective agreement in 1992, there would by now have been three open periods provided under the Act.

42. The decisions in *Salvation Army Grace Hospital* [1978] OLRB Rep. Dec. 1142 and *London and District Service Workers' Union, Local 220*, [1985] OLRB. Rep. Oct. 1490 deal with different circumstances and do not provide assistance on this issue of the nature of the November 26, 1996 award.

43. In *Chateau Gardens Queens, supra*, the Board found an application for certification to be timely, notwithstanding the fact that the interest award dealt only with common issues and that "local" issues remained outstanding. The Board reviewed many of the same provisions of the HLDAA and commented:

34. While the problem posed by this case has the flavour of a Times crossword puzzle, in our opinion, the key to its solution lies in section 10(9) of the HLDAA, when read together with the purpose of the "open period", and the various HLDAA provisions dealing with the "term of operation" of the collective agreement.

35. As we have already mentioned, the "term of operation" prescribes not only the duration of a particular benefit stream, and the parties' bargaining cycle, but also the "open period" during which employees can change bargaining agents. In order to decide what the term of operation is, section 10(9)-(12) must be read together, and in that regard we might note that section 10(12) refers specifically to section 5(4) [now 7(4)] of the *Labour Relations Act* - the section which specifies when a raiding union can apply to displace its rival.

36. Since we want this decision to be understood by the employees affected by it, we will work through the relevant provisions of HLDAA, one by one.

37. First of all, we think it is significant that under section 10(9), it is the date upon which the arbitrator settles the common issues, that is deemed to be the "effective date" of any document that constitutes a collective agreement. That is the date when any eventual collective agreement comes into existence. It is from that date that subsequent HLDAA provisions mark time.

38. Subsection 10 provides that the collective agreement remains in force for a period of one year from the effective date [the "common issue" decision date - here December 16, 1991]. However, subsection 11 can override subsection 10, providing that the agreement will cease to operate two years after the expiry of the old collective agreement. Stopping there, the formula is: the agreement operates for one year after the date of the arbitration award [December 16, 1991], but no longer than two years from the expiry of the old agreement.

39. Subsection (12) adds an additional variable: if the award is issued beyond two years from the expiry of the old agreement, the collective agreement is extended for a period of ninety days for the express purpose of creating an ascertainable "open period". In effect, the statute breathes artificial life into an expired agreement for the purpose of giving employees an opportunity to challenge or change their bargaining agent.

40. This formula is a little bit complicated but, in each case, it turns upon an ascertainable benchmark which can be readily ascertained by disaffected employees and rival unions. One need only know two things: the expiry date of the old agreement which will be apparent from its terms, and the date of the common issue arbitration award which will likewise be apparent on its face.

41. This scheme does not depend upon whether or when the local issues are resolved at arbitration. Those matters can either be decided by the arbitrator immediately, or s/he can refer them to the parties for further bargaining. But any delays associated with the resolution of local issues will not interfere with the "effective date" from which the collective agreement operates, and thus the term of operation of the agreement. And, if the term of operation is fixed with reference to ascertainable facts and statutory parameters, one will be able to calculate the "open period". Finally, in this scheme, employees will have an opportunity to review the basic benefits secured by their bargaining agent before being asked to vote for a rival (assuming that employees might blame their union for the results of arbitration - an unwarranted conclusion, but not an unlikely scenario).

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49. In the alternative, if anything turns on the fact that the parties did not bother to formally transform the Bendel award into a collective agreement, subsection (12) comes into play and the result is the same. The Charney award of December 16, 1991 came down more than two years after the last formal collective agreement between these parties had expired (i.e. in 1988). If that is so, subsection (12) would create an artificial "open period" for ninety days from December 16, 1991, the date the Charney common issues award is released.

50. In our opinion, the arbitration decision contemplated by section 10(12) is the one determining the common issues, and thus the "effective date" of the agreement. That is the award which is significant for calculating the time periods prescribed by section 10(9)-(11) and it makes sense that section 10(12) refers to the same award: the one issued by Mr. Charney on December 16, 1991.

44. In reaching its conclusion the Board relied on the words "gives its decisionupon matters of common dispute" in subsection 10(9) to conclude that it was unnecessary to await the outcome of the local issues in order for subsection 10(12) to take effect. Subsection 10(9) is applicable to interest arbitrations pursuant to section 8 of the HLDAA, which provides, in essence, for forms of consensual industry bargaining, that is, one arbitration to determine matters of common dispute between more than one set of bargaining parties. That is not the case here. This interest arbitration was specific to Local 220 and this employer. The comparable provision to subsection 10(9) but applicable in this case is subsection 10(8) of the HLDAA. The language used there is simply "gives its decision"; the same language that is in issue in subsection 10(12).

45. The language "gives its decision" is however to be contrasted to subsection 10(5) which stipulates that within five days "of the date of the decision" of the interest arbitration board, the parties shall prepare and execute the collective agreement. That language more clearly reflects the date of the award. Thus in assessing what the statute means by the term "decision" it appears that it contemplates a decision so sufficiently complete that the parties can, as a general proposition, prepare the collective agreement giving effect to that decision within a period of five days. The Barton award specifically allows the parties a period of 90 days to negotiate lay-off and recall language. If the November 26, 1996 award determined the matters in dispute, that provision of 90 days runs directly counter to subsection 10(5) and by extension, subsections 10(6)-(7).

46. By referring the matter back to the parties to negotiate lay-off and recall language, the award, although further delaying the process, seeks to effect a useful collective bargaining result - to have the parties reach an agreement. In effect, the award indicates that the interest arbitration board is adjourning for a period of 90 days; that it is refraining from deciding on matters in dispute until that negotiating opportunity is exhausted and only at that point will the interest arbitration board decide matters in dispute and render a "decision".

47. We are satisfied that the concern expressed by the applicant (at paragraph 32) is addressed by the fact that if the parties are able to settle the lay-off and recall language the interest arbitration board must be so advised. Until it is so advised there remains an issue in dispute and according to both section 9 and subsection 10(4) of the HLDAA the interest arbitration board is required to decide it. Thus, in the particular circumstances there can be no “retroactive” concluding of the decision. It is only at the point that the interest arbitration board confirms that the lay-off and recall language is settled and therefore is outside the ambit of the interest arbitration board’s authority to decide, that there is a decision on matters in dispute. That interpretation is consistent with section 9 of the HLDAA and with the intent set out in both subsections 10(4) and (5) of the HLDAA.

48. We find therefore that the interest arbitration board has not yet given its decision and consequently subsection 10(12) of the HLDAA has not yet been triggered.

49. We recognize that in the particular circumstances of this case there may continue to be some confusion as to the date the interest arbitration board then “gives” its decision depending on how the parties and the interest arbitration board deal with the lay-off and recall issue. Should the parties not settle the language and the matter is remitted to the interest arbitration board then the issue of the date the board “gives” its decision should be clear. Should the parties settle the language the interest arbitration board should confirm that matters in dispute have been decided. In these circumstances we direct both the employer and Local 220 to advise the applicant of any settlement of the lay-off and recall language and the date of any confirmation of same by the interest arbitration board. In either event of the language being settled or remitted to the interest arbitration board, we direct the employer and Local 220 to forthwith provide a copy of this decision to the interest arbitration board.

50. The parties also differed in their views as to how to calculate the different time periods should we find that November 26, 1996 was the “date the board of arbitration gives its decision”. Although not now necessary to address in the circumstances of this case, again, a few comments may provide some guidance. The issue in respect of the 90 day period under subsection 10(12) of the HLDAA was whether it was “calendar” days or “working” days. Local 220 relied on the recent changes to the certification provisions in the Act, noting that votes are held within five working days, not calendar days. However, subsection 8(5) of the Act makes specific reference to the exclusion of Saturdays, Sundays, and holidays for purposes of that calculation and is not a useful guide. In the absence of any qualification limiting the period to working days, we prefer to give the words their normal meaning, that is, the period is one of 90 (calendar) days.

51. We are of the view that under section 7(4) of the Act (and similarly under the termination provisions) the reference to the “last two months” is not usefully determined by counting back on the basis of a varying number of days depending on the months in issue. Rather, it is a calculation going back “two months”, that is, where agreements commonly expire at the end of a month (December 31) the last two months commence on the first day of the second last month (November 1). If the agreement expires other than at the end of the month, for example on November 14, the last two months in this example would commence on September 15. The only potential anomaly created by this method arises where an agreement expires on May 29 or 30 because of a short February.

52. In summary, we find that the award dated November 26, 1996 does not decide the matters in dispute between the employer and Local 220 and that therefore, the 90 day extension under subsection 10(12) of the HLDAA does not run from that date. Matters in dispute continued to be outstanding as of the date of the filing of this application on February 11, 1997 and it is therefore premature and untimely. The application is therefore dismissed. This dismissal is without prejudice to the applicant’s right to re-apply in a timely fashion and the parties are directed to the Board’s comments and directions in paragraph 49 of this decision.

0496-96-G; 0497-96-G; 0498-96-U; 1450-96-JD Labourers' International Union of North America, Local 1089, Applicant v. **Doug Chalmers Construction Limited**, Responding Party v. United Brotherhood of Carpenters and Joiners of America, Local 1256, Intervenor; Doug Chalmers Construction Limited ("Chalmers"), Applicant v. Labourers' International Union of North America, Local 1089 ("Labourers") and United Brotherhood of Carpenters and Joiners of America, Local Union 1256 ("Carpenters"), Responding Parties v. Teamsters Local 880 and International Union of Operating Engineers, Local 793, Intervenor

Construction Industry - Jurisdictional Dispute - Labourers' union and Carpenters' union disputing assignment of work of tending carpenters working on scaffolding and supervision of such work - Board satisfied that Labourers have tending (of carpenters engaged in scaffolding work) work jurisdiction in the relevant geographic area - Board requiring assignment of at least one construction labourer to tend carpenters on all five scaffolding jobs in issue and permitting employer to add additional labourers to tend carpenters as it considers appropriate - Board making no order with respect to supervision of work in dispute

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *F. B. Reaume* and *J. Redshaw*.

APPEARANCES: *A.M. Minsky* and *Robert Leone* for Labourers' International Union of North America, Local 1089; *G.F. Luborsky* and *D.H. Chalmers* for Doug Chalmers Construction Limited; *N.L. Jesin* and *R. Carlton* for United Brotherhood of Carpenters and Joiners of America, Local 1256; *N.L. Jesin* for Teamsters Local 880; no one appearing for I.U.O.E. Local 793.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER J. REDSHAW;
May 8, 1997

1. The name of the responding party in Board File Nos. 0496-96-G, 0497-96-G and 0498-96-U is amended to read: "Doug Chalmers Construction Limited".
2. Board File Nos. 0496-96-G and 0497-96-G are grievances in the construction industry which have been referred to the Board under section 133 of the *Labour Relations Act, 1995*. Board File No. 0498-96-U is a complaint under section 96 of the Act. Board File No. 1450-96-JD is a jurisdictional dispute complaint under section 99 of the Act.
3. A hearing was convened on October 2, 1996. On agreement of the parties, consideration of the two grievances and the section 96 complaint was deferred pending the disposition of the jurisdictional dispute complaint and the Board proceeded to hold a consultation with respect to the jurisdictional dispute complaint. It was readily apparent that the crux of the dispute between the parties concerned work jurisdiction. Accordingly, the Board considered it appropriate to proceed in the manner agreed to between the parties.
4. The work in dispute in the jurisdictional dispute complaint is the work of tending carpenters working on scaffolding, and the supervision of such work at various (it appears five) projects at Suncor, Imperial Oil, Shell Oil and Nova (Petrosar) in Sarnia in 1996.
5. The applicant employer ("Chalmers") is a major scaffolding contractor in the Sarnia area. There is a five year history to this dispute, and Chalmers asks not only that the Board affirm the correctness of the particular work assignments in issue, but also that the Board resolve the broader issue of future assignments by declaring that none of the Labourers, Carpenters and Teamsters or Operating

Engineers Unions, or any combination of them, have the exclusive right to perform the work in dispute, and that it has the discretion to assign the work as it considers appropriate.

6. It is easy to understand an employer's (or a trade union's) desire for a final resolution of an issue which has vexed it for some time. However, it is not clear that the Board is able to make the kind of order sought by Chalmers in that respect. In any case, the Board is not inclined to do so.

7. Prior to the proclamation of the current Act, the jurisdictional dispute provisions in the legislation contained a provision which specifically empowered the Board to make an order regarding future jobs. Section 93(2) of the Bill 40 Act, for example, (which Act was repealed and replaced by the current, Bill 7, Act) provided that:

93.- (2) An order may provide that it is binding on the parties for other jobs then in existence or undertaken in the future in the geographic area that the Board considers appropriate.

Prior to that, a similar provision, which had been in the Act for many years, provided that:

91.- (2) The Board may in any direction made under subsection (1) provide that it shall be binding on the parties for other jobs then in existence or undertaken in the future in such geographic area as the Board considers advisable.

There is no analogous provision in the current Act. Accordingly, it is far from clear that the Board continues to have jurisdiction to make orders regarding other or future jobs (although the Board's decisions presumably continue to have the persuasive or educational value they have always had with respect to subsequent or other assignments of the same work).

8. Even when the Board had jurisdiction to make orders regarding other or future work assignments, it did so rarely, generally in circumstances in which there was an established pattern of jurisdictional disputes concerning a particular and clearly identifiable "work" in a specific area involving a specific employer, and where it seemed likely that there would be further jurisdictional disputes concerning the assignment of that particular work by that employer in that geographic area. This approach of the Board to its jurisdiction to make orders concerning future work assignments was consistent with the Board's view that the jurisdictional dispute complaint provisions empower it to inquire into complaints concerning the assignment of particular or discrete packages of work rather than "work" more generally defined (see, for example, *Foster Wheeler Limited*, [1989] OLRB Rep. Feb. 128; application for judicial review dismissed [1990] OLRB Rep. May 630 (Divisional Court); *Acco Canadian Material Handling*, [1990] OLRB Rep. Sept. 915; *Commonwealth Construction Company*, [1991] OLRB Rep. June 742).

9. This approach is also consistent with the Board's general approach to jurisdictional dispute complaints, an approach which not only focuses on the particular work in dispute, but which also considers the specific parties to the dispute, the work assignment practice(s) of the employer involved, and the general work assignment practice in the appropriate geographic area. The Board is sensitive to the need to determine each dispute on its particular merits, and also that work practices can evolve and change over time. As a result, except in extraordinary circumstances (as described above), it would generally not be appropriate for the Board to extend its determination of a jurisdictional dispute complaint beyond the particular case before it.

10. Further, it is difficult to imagine a situation in which the Board would make an order permitting an employer to assign work to whomever it wishes (at least as between 2 or more construction trades). To do so would in effect excuse the employer from recognizing the pattern of work jurisdiction established in the construction industry, or from responding to legitimate jurisdictional claims, and from the jurisdictional dispute complaint provisions in the Act. It is not appropriate that the work

assignment decisions of any employer be immune to challenge in circumstances where the legislation contemplates that there are different work jurisdictions and that these work jurisdictions will conflict from time to time, and which provides a mechanism for resolving jurisdictional dispute complaints.

11. Accordingly, the Board will limit itself to determining the particular work in dispute in this case.

12. It is neither possible nor appropriate to describe an exhaustive list of factors which are considered, or to construct or mechanically apply some formula or checklist in that respect. Notwithstanding this, the Board has developed a general approach, which has withstood the test of time and which has been accepted in the construction industry, involving the use of several broad factors which the Board will consider in determining a jurisdictional dispute complaint. These factors were first set out in *Canada Millwrights Ltd.*, [1967] OLRB Rep. May 195, as follows:

- trade union constitutions and collective agreements
- trade agreements between the competing parties
- area practice
- employer practice and preference
- safety, skill and training
- economy and efficiency

For almost thirty years, the Board's approach to jurisdictional dispute complaints has involved an assessment of these six factors. However, the Board's jurisprudence also demonstrates the Board's willingness to consider anything which it is satisfied is relevant to the determination of a particular jurisdictional dispute complaint. Accordingly, the six factors identified as aforesaid do not constitute an exhaustive list. Nor does the order in which the factors are listed or considered indicate the weight which may be given to any of them in a particular case. Indeed, in a given case some factors will be of little or no assistance, while in another case they or one of them may be determinative. For example, in recent years, the work jurisdictions asserted by construction trade unions in their respective constitutions and collective agreements have become so broad that they are often of little assistance, particularly when the work in dispute is not part of the core of a trade's work jurisdiction, and, as is generally the case, the employer concerned is bound to collective agreements which cover the work in dispute with all of the competing trade unions.

13. Because of the historical development of the division of work in the construction industry on a craft or trade basis, and the overlap between the construction trades and the work jurisdictions which they assert, the Board has recognized that collective bargaining relationships, by themselves, will generally not be determinative of a jurisdictional dispute complaint. Consequently, while a trade union which has no applicable collective agreement with the employer which assigned the work in dispute is likely to have a difficult time having the assignment altered, a trade union which has a collective agreement with the assigning employer will not necessarily be successful in fending off a claim for work by a trade union which has no collective agreement with that employer (*Brunswick Drywall Limited*, [1982] OLRB Rep. Aug. 1143; *Pigott Construction Limited*, [1992] OLRB Rep. June 748 ("Pigott #2"); and see *Groff & Associates Ltd.*, [1994] OLRB Rep. July 846 with respect to the difficulties which a trade union without a collective agreement will face), so long as the issue is one of work jurisdiction and not one of representation (*Simcoe Mechanical Contracting Ltd.*, [1982] OLRB Rep. Sept. 1352).

14. Similarly, although it will equally often not be the case, a single factor may be determinative of a jurisdictional dispute complaint. Work jurisdiction trade agreements provide one example of the factor to which the Board has given great weight (especially in recent cases: *Pigott #2*, *supra*; *Ellis-Don Limited*, [1993] OLRB Rep. Nov. 1130, the various decisions in *Kora Mechanical Inc.*, [1992] OLRB Rep. June 740 and decisions dated March 3, 1993, April 26, 1993, June 14, 1993, July 12, 1993 and November 8, 1993, all unreported; but see *Groff & Associates Ltd.*, *supra*, where the Board declined to give effect to a trade agreement in circumstances where the established area practice in the relevant geographic area was inconsistent with the trade agreement).

15. Similarly, although the Board has determined jurisdictional dispute complaints in favour of a trade union which area practice did not favour, (*Simcoe Mechanical Contracting Ltd.*, *supra*; *K-Line Maintenance & Construction Limited*, [1979] OLRB Rep. Dec. 1185), area practice has more and more often been a determining factor (*Ilena Construction Company Limited*, [1974] OLRB Rep. Nov. 775; *Acco Canadian Material Handling*, *supra*). Indeed, in *Electrical Power Systems Construction Association*, [1992] OLRB Rep. Aug. 915, the Board observed that “it is the rare and unusual complaint in which the Board does not attach significant and primary significance to area and employer past practice ...”, and also that “... the real crux of most jurisdictional disputes revolves around the two past practice criteria.” The emphasis on past practice is reflected in the time and energy devoted to the practice factors in jurisdictional dispute proceedings before the Board.

16. The Board has developed its approach to construction industry jurisdictional disputes having regard to the nature and organization of the construction industry (on both the employer and trade union sides), which is predominately on a “local” geographic basis which tends to mirror the geographic jurisdictions of construction local trade unions. Of course, the Board does not blindly adhere to single (local) area practice. In an appropriate case, the Board will look to an “industry practice” which is specific to the particular work in dispute but in a broader geographic area (*Foster-Wheeler Limited*, *supra*), to jurisdictions of competing trade unions which extend beyond the established Board areas or which are not congruent (*Commonwealth Construction Company*, *supra*). Cases such as this should not be taken to be anything more than the exceptions to the general rule which they are. They merely underline the Board’s willingness to take special circumstances into account in particular cases, and to approach jurisdictional dispute complaints on a case specific basis.

17. Turning to the jurisdictional dispute in this case, we begin by observing that neither the Teamsters nor the Operating Engineers have made any claim to any of the particular work assignments in dispute in this case (indeed neither filed a brief as required by the Board’s Rules). Their participation has been prompted by the broad net which the employer seeks to cast, and the potential concern which this raises with respect to their respective general work jurisdictions. However, the Board has determined that it will limit its consideration to the particular dispute(s) before it. The nature of tending work is such that there could, for example, be a dispute between the Labourers and the Teamsters or Operating Engineers over the assignment of certain kinds or components of tending work. This complaint raises no issue of work jurisdiction as between either the Teamsters or Operating Engineers, and either the Labourers or the Carpenters with respect to the particular tending work in dispute or tending work in general, and nothing in this decision should be construed to be a comment on the distribution of tending work other than that specifically in issue in this complaint. Although it is not explicit in the materials, the focus of the jurisdictional dispute in this case is the tending and supervision of tending work from the base of the scaffolding (as indeed counsel for the Labourers specifically stated in his oral representations at the consultation).

18. Chalmers claims to be the largest supplier of scaffolding in the Sarnia area. It asserts that it and another employer, Steeplejacks Services, together perform approximately 90 per cent of all scaffolding work in Lambton County. The 90 per cent figure is not agreed to by the Labourers, but it is

conceded that Chalmers, which is a general contractor, is an important scaffolding contractor in the Sarnia area. It is clear from the materials that Chalmers does a lot of scaffolding work in Lambton County.

19. In 1992, the Labourers filed a jurisdictional dispute complaint concerning Chalmers' assignment of work described as "all work involved in the handling (from base of scaffolding), erection and dismantling of scaffolding", which the Labourers asserted should have been performed on a composite crew basis, to the Carpenters (Board File No. 2214-92-JD). In that case, the Labourers' asserted that the work in dispute ought to have been assigned in accordance with the scaffolding trade agreement between the two unions; that is, on a two to one (carpenters to labourers) composite crew basis.

20. In a four paragraph decision issued on January 29, 1993 in that case, the Board made the following final order: "the erection and dismantling of scaffolding shall be assigned to carpenters with labourers tending".

21. In another Board decision also dated January 29, 1993, the Board made an identical order in a jurisdictional dispute complaint in Board File No. 2213-92-JD, a jurisdictional dispute complaint between the same carpenters and labourers' locals herein regarding the assignment of the same work in dispute as in Board File No. 2214-92-JD by a different employer.

22. The Board gave no explanation or reasons for either order. Three things are nevertheless apparent from these decisions. The Board rejected the Labourers' claim to the erection or dismantling of scaffolding, the Board accepted the Labourers' claim to tending work from the base of the scaffolding, and the Board either rejected or decided not to deal with the concept of any particular ratio of carpenters to labourers in that respect.

23. Subsequently, Chalmers and the Labourers entered into a Memorandum of Understanding dated April 7, 1993 as follows:

Memorandum of Understanding

Between:

Chalmers Construction Ltd.

And

Local Union 1089

In an effort to interpret the Labour Relations Board decision (OLRB) of January 29th, 1993, file 2214-92-JD re-Jurisdictional Dispute between Carpenters Local 1256 and Labourers Local 1089 on the handling (from base of scaffolding) erection and dismantling of scaffold, the parties hereby agree as follows:

The Company will take the following criteria into consideration in the assignment of work.

1) Cost and efficiency

2) productivity of work crews

Subject to the foregoing and any overriding jurisdiction of any trade, the following outlines the general manner in which scaffolding will be tended, erected, and dismantled.

1) The erection and dismantling of scaffold will be assigned to Carpenters, with Labourers tending.

- 2) It is agreed that it is Labourers jurisdiction to establish all scaffold material stock piles, handling from stockpiles which includes carrying by hand, loading and off loading, tying on/off of scaffold material to point of erection.
- 3) It is agreed that at the base of the scaffold Labourers will hand and/or tie on scaffold materials and the Carpenters will draw up from top of the scaffold.

Both parties agree to act in good faith in the application of this document and agree that should any dispute arise in its interpretation the parties will meet immediately to resolve same.

In consideration of the foregoing the Union hereby agrees to advise the Ontario Labour Relations Board that its grievance dated December 13, 1991 (Board File No. 3453-91-G) will be adjourned sine die, and that its grievance (sic) dated October 29, 1992 (Board File No. 3259-92-G) and November 4, 1992 (Board File No. 3260-92-G) are withdrawn.

Dated: *April 7, 1993.*

For the Company
(*"Doug Chalmers"*)
Doug Chalmers

For the Union
(*"Robert Leone"*)
Robert Leone

The Carpenters, which participated in the proceedings in Board File No. 2214-92-JD (and also in Board File No. 2213-92-JD), were not a party to this memorandum, and, by letter dated April 8, 1993, expressly took issue with it to the extent that the Memorandum is "inconsistent with and contrary to, not only the Board's decision but the past and current practice of Doug Chalmers Construction and the handling, erection and dismantling of Scaffolding."

24. Predictably, the dispute did not end there. In that respect, Chalmers pleads in its brief in this complaint that:

14. After the Board's decision of January 29, 1993, Chalmers continued assigning work to Carpenters and Labourers on the same basis that it had always assigned work on scaffold projects; namely, Carpenters had exclusive jurisdiction to erect and dismantle scaffolds, with Labourers tending on those specific projects of sufficient size and/or complexity where such tending functions by Labourers was determined necessary in Chalmers' opinion, and with Carpenters, Labourers, Teamsters, Operating Engineers or any combination thereof used for tending purposes where the specific scaffolding job in issue made such assignments appropriate.

15. Consistent with Chalmers' past practice, Chalmers did not assign any tending work to Labourers on a number of scaffold projects where such tending work was not necessary given the size and nature of the project concerned. Accordingly, as indicated in the supplementary documents in the Grievance Documentation already before the Board, Chalmers utilized Carpenters only on scaffold projects, with the Carpenters tending to their own needs on a regular basis after January 29, 1993 (as had been the practice in the past). Such practice was consistent with the Memorandum of Agreement entered into between Chalmers and Local 1089 dated April 7, 1993 (reproduced at Tab 7 in the Grievance Documentation).

25. The Labourers submit that that is precisely the problem; namely, that Chalmers has continued to act as it always has, without regard to the Board's decision in Board File No. 2214-92-JD or the April 7, 1993 Memorandum of Understanding between them.

26. In this complaint, Chalmers' position is essentially that tending work associated with the erection or dismantling of scaffolding is not within the exclusive jurisdiction of the Labourers, or indeed of any trade or trade union, and that it is properly assigned to members of either the Carpenters, Teamsters, Operating Engineers or Labourers unions depending on the nature of the particular scaffolding work and Chalmers' considerations of economy and efficiency. Chalmers submits that "tending" is a flexible work component which does not lend itself to a rigid jurisdictional demarcation. It expresses

a “featherbedding” concern because it asserts that construction labourers would really have little or nothing to do, and it submits that it would be uneconomical and inefficient for the company to use members of the Labourers to tend the carpenters who erect or dismantle its scaffolding.

27. The Labourers say that it does not claim a specific ratio and that it recognized the need for flexibility, but that the result of the Chalmers approach to scaffolding work is that its members have been entirely cut out of the tending work to which the Board has already recognized they are entitled.

28. Let us remember what we are talking about here: essentially the manual handling of scaffolding materials up to or down from the carpenters who are either erecting or dismantling scaffolding, as the case may be. Although this work undoubtedly requires careful attention and some skill, members of either trade union can quite capably perform it. The factor of skill, training and safety favours the jurisdictional claim of neither trade union.

29. It is common ground that the applicable collective agreements relevant to the jurisdictional dispute are the Labourers’ and Carpenters’ provincial agreements, and that Chalmers is bound by both. Both collective agreements cover the work in dispute. So do both union constitutions.

30. Nevertheless, there is a difference between the jurisdictional claims of the Labourers and Carpenters as expressed in their respective constitutions and provincial agreements. It is apparent that tending work associated with many other trades, including carpenters, is part of the core of the work jurisdiction claimed and exercised by construction labourers represented by the Labourers’ union. On the other hand, tending work is not at the core of the work jurisdiction of the Carpenters’ union, although it is work which is necessarily incidental to and not far from that core jurisdiction. Accordingly, the collective agreement/constitutional factor slightly favours the claim of the Labourers.

31. The employer and area past practice materials filed by the parties indicate several things: first, that the work of tending carpenters who are erecting or dismantling scaffolding is an identifiable and severable component of that work; second, that there has been a lot of scaffolding work performed both generally, and specifically by Chalmers in Lambton County; and third, that there is no apparent (on the face of the materials) single completely consistent practice of either employing or not employing construction labourers to tend carpenters engaged in erecting or dismantling scaffolding in Lambton County, again either generally or by Chalmers. It appears that as a general matter, whether and how many labourers are assigned to tend carpenters in that respect depends on the nature and size of the scaffolding job. Clearly, construction labourers have commonly been employed to tend carpenters doing scaffolding work, both generally and by Chalmers himself. Equally clear, there are a significant number of instances in which no construction labourers have been assigned to tend such carpenters.

32. The Board’s first impression was that the parties had perhaps failed to focus on the particular work in dispute in the work assignments which prompted the grievances which led to this jurisdictional dispute complaint. However, these parties are all experienced in jurisdictional dispute complaints, and all of them were represented by experienced labour relations counsel. Because of this, and because no one suggested that the Board should hear evidence or is otherwise unable to decide the issue on the basis of the materials filed, the Board reviewed the materials again.

33. As we did so, it struck us that the parties had spent no time on the types of scaffolding, on the materials used, or on the environment in which scaffolding was erected or dismantled. On the contrary, in one way or another in their employer and area practice materials, the parties have focused entirely on the number of carpenters engaged to perform the erection or dismantling. The Labourers’ materials focus on the number of carpenters and the number of labourers relative thereto. The Carpenters’ materials focus on erection and dismantling work, which is *not* part of the work in dispute in this complaint, but to the extent that these materials relate to tending work they do so on the basis of the

number of carpenters (or apprentices). Chalmers' materials deal with the issue of the number of hours worked by carpenters, relative to the number of hours worked by labourers. There appears to be no reason why this cannot be translated into roughly equivalent numbers of carpenters and labourers. Accordingly, it appears that this is also the appropriate way to approach the dispute in this case.

34. Chalmers filed extensive materials concerning its own past practice. However, its materials for the years prior to 1993 are incomplete in that they consist of selected months from each previous year. There is nothing which suggests why the particular months (which are not the same for each year) were selected, or what they are representative of. However, the materials for the period January 2, 1993 to April 27, 1996 appear to be complete and reveal the following:

Total number of jobs - 2394

Number of jobs where no labourers used - 454

(19% of total)

Number of jobs where no carpenters used - 29

(0.01 of total)

Number of jobs where number of carpenters hours roughly equal number of labourers hours (i.e. 1:1 ratio) - 299

(12.5% of total)

Number of jobs where carpenters hours were roughly double the number of labourers hours (i.e. ratio 2:1 carpenters to labourers) - 910

(38% of total)

Number of jobs where carpenters hours were roughly triple the number of labourers hours (i.e. ratio 3:1 carpenters to labourers) - 442

(18.5% of total)

Number of jobs where carpenters hours were 4 times or more the number of labourers hours (i.e. ratio 4:1 or greater) - 260

(10.9% of total)

Note: Number of jobs in 4:1 ratio was 82 or roughly 0.03% of the total.

Accordingly, in 29.9% of Chalmers' jobs between January 2, 1993 and April 27, 1996, the company used either no labourers or fewer than one labourer for every 4 carpenters. The largest single ratio, which also appears to be the dominant area practice was 2:1 carpenters to labourers, and on 69% of its jobs during that period Chalmers used at least one labourer for every three carpenters.

35. However, the materials do not suggest a ratio correlation. That is, they do not suggest that there is necessarily a correlation between the number of construction labourers Chalmers required or used and the number of carpenters on the job, except that on over 80% of its jobs Chalmers used at least one labourer.

36. The materials suggest that tending work has generally been assigned to labourers on even the smallest scaffolding jobs, but that more than one labourer has not been generally assigned except on relatively large jobs. Even though Chalmers has assigned no labourers to tend carpenters on nearly 20% of its scaffolding jobs, it is difficult to discern any pattern to this. For example, Chalmers has used labourers on many jobs involving less than 10 hours of carpenters work. On the other hand it has not used any labourers on a number of jobs involving more than 10 hours carpenters work. Further, outside of Chalmers itself, there is no evidence which suggests an area practice which excludes labourers from tending carpenters engaged in erecting or dismantling scaffolding in Lambton County.

37. In the result, the Board is satisfied that even on Chalmers' own past practice, the Labourers have established a claim to the tending work in dispute. In our view, the factors of employer and area practice both favour the claim of the Labourers.

38. The "trade agreement" which was before the Board in Board File Nos. 2213-92-JD and 2214-92-JD, and which is before the Board in this complaint is labelled as a "Scaffolding Agreement". Although the document filed with the Board bears no signature, no one suggested that this is not an agreement which, it appears, was entered into by Carpenters Local 1256 and Labourers' Local 1089, the parties herein, on December 17, 1974. It provides that:

SCAFFOLDING AGREEMENT

between

Carpenters Local 1256 and Labourer's Local 1089

Agreement reached on Dec. 17, 1974 by

Jack Piggott, Business Manager, Local 1256

Rocco D'Andrea, Business Manager, Local 1089

Orfea Iacobelli, Business Agent, Local 1089

- #1 Labourer will build stock piles as designated by management -
- #2 Carpenters and Labourers will work together in hauling and labourers will assist in hoisting and erecting of scaffolding in ratio of 2 to 1, i.e. 2 Carpenters, 1 Labourer.
- #3 Dismantling will be done the same way and same ratio.

NOTE That the ratio is basically 2 to 1. Carpenters to Labourers, if any variation to this ratio is needed it can only be changed by agreement between the two locals and contractor involved.

This agreement appears to be directed to the erecting and dismantling of scaffolding, and although it does not use the word, also to the tending work associated with it. However, as we have already observed, the Board has already declined to give effect to this trade agreement insofar as it purports to recognize the Labourers' claim to erection or dismantling work. Further, although the Board has recognized the Labourers' claim to tending work, the Board has not applied a ratio in that respect.

39. Turning to Chalmers' economy and efficiency concerns, in most cases, an employer is in the best position to assess the most economical and efficient way for it to structure its work force. However, employers do not always make an accurate or correct assessment in that respect, in part because they are not always entirely objective in their approach to such questions. Further, jurisdictional disputes are about work jurisdiction, not about economy and efficiency.

40. The fact is that collective bargaining rights and collective agreements inevitably affect the manner in which employers operate, particularly in the construction industry which is divided along craft or trade lines (see paragraphs 13 and 16 above). Indeed, as the Board pointed out in *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254 (application for reconsideration dismissed [1989] OLRB Rep. Mar. 234), construction industry employers and trade unions have tended to organize themselves along trade lines. In the result, the focus of construction collective agreements tends to be on the employment and representation of employees engaged in particular trades. That is, construction collective agreements tend to define the employees who are in the bargaining unit to which the collective agreement applies on the basis of the work they perform. In other words, work jurisdiction is the “stuff” of construction bargaining rights and collective agreements. Jurisdictional disputes arise because the work jurisdictions of the various construction trades are not sharply defined and tend to overlap.

41. In order to give proper effect and meaning to bargaining rights in the construction industry, considerations of economy, efficiency or employer preference cannot be allowed to operate as some sort of “trump” factor. On the contrary, they must give way to other relevant considerations, particularly to the collective agreement factor, particularly when the area practice is consistent with the collective agreement and a trade union’s core work jurisdiction is in issue.

42. Accordingly, considerations of economy and efficiency (and employer preference as expressed through other than the employer’s practice) will generally be determinative only when an assessment of all other relevant factors favours neither of the competing trade unions. That is, it is a kind of “tie-breaker”.

43. What we are left with in this case then is this:

- (a) the constitution/collective agreement factor slightly favours the claim of the Labourers;
- (b) the skill, ability and safety factor is neutral;
- (c) the area and employer past practice factors favour the claim of the Labourers;
- (d) an agreement between Chalmers and the Labourers which recognizes and favours the Labourers’ claim;
- (e) a trade agreement which it appears the Board has declined to apply in two earlier cases, one of which involved the same employer and competing trade unions as herein;
- (f) factors of economy, efficiency and employer preference which it appears ought not be applied.

44. Accordingly, on the basis of the materials filed, the Board is satisfied that the Labourers do have a tending (of carpenters engaged in scaffolding work) work jurisdiction in Lambton County. The difficulty which arises is ascertaining the extent of that jurisdiction. In that respect, the Board is satisfied that in Lambton County (the relevant geographic area), both Chalmers and scaffolding contractors have assigned a labourer to tend carpenters on the vast majority of scaffolding jobs and have thereafter been permitted and have exercised considerable discretion with respect to assigning additional labourers to tend carpenters performing scaffolding work. The Board is satisfied that the result in this complaint should reflect this.

45. In that respect, the Board considers it appropriate to require that Chalmers assign at least one construction labourer to tend the carpenters on all of the scaffolding jobs in issue, and to permit Chalmers to add additional labourers to tend carpenters as it considers appropriate.

46. Turning to the issue of the supervision of the work of tending carpenters working on scaffolding, Article 10.2 of the "Local Union Schedule for Local 1089 - Sarnia" to the Labourers' provincial agreement provides that:

10.02 Whenever there is more than one (1) labourer on a project, there shall be a working labour foreman or a non-working labour foreman on the same project. With eight (8) labourers or more on a project, no labour foreman shall be a working foreman. No labour foreman shall supervise more than ten (10) labourers. With fifteen (15) labourers on a project, a general foreman shall be added. No general foreman shall supervise more than five (5) foremen. With fifty (50) labourers on a project, an area general foreman shall be added. All supervision mentioned above will be included within the number specified.

47. The collective agreement obligation is not determinative of the jurisdictional dispute concerning the assignment of the supervision of tending work. With respect, it is far from obvious that tending work being performing by construction labourers should be supervised by construction labourers, except perhaps where there is a sufficiently large number of construction labourers employed to perform such work. Further, the employer and area practice evidence before the Board, suggests that the supervision of labourers tending carpenters is not done by other members of the labourers. Nor is it obvious why a single labourer can be adequately supervised by the same individual who supervises the carpenters on the job, but where there are two labourers, one of them has to perform any necessary supervision of the other. Further, since the Board has concluded that only one construction labourer is mandatory, requiring at least one of any additional labourers to be a working or non-working foreman is likely to reduce the number of discretionary labourers and therefor the work opportunities for labourers.

48. Consequently, while there may be some threshold number of labourers performing tending work which if exceeded will require Chalmers to have a working or non-working labour foreman on the job to supervise them, none of the jobs in issue in this case seems to justify this, and the nature of the materials before the Board is such that we are not inclined to venture any opinion in that respect in this case.

49. In the result, the Board does not find it appropriate to interfere with that part of the work assignments herein.

50. The Board therefor orders Doug Chalmers Construction Limited to assign one construction labourer who is a member of Labourers' International Union of North America, Local 1089 to each of the scaffolding jobs in issue. Doug Chalmers Construction Limited is entitled to either add or not add additional such construction labourers to any of the scaffolding jobs as it considers appropriate.

DECISION OF BOARD MEMBER F. B. REAUME; May 8, 1997

1. With the greatest of respect I must dissent from the majority decision in this case although it places the least possible infringement on Chalmers' right to assign tending work based on cost and efficiency in connection with the erection and dismantling of scaffolding.

2. The Memorandum of Understanding between the applicant union and the respondent Chalmers acknowledges the need for economy and efficiency (cost and efficiency) with regard to the understanding of the work assignments that follow.

3. In assigning work from January 2, 1993 to April 27, 1996, Chalmers utilized labourers in more than eighty percent of the jobs performed. As shown in paragraph 34, Chalmers used labourers in varying ratios to carpenters for scaffold erection and dismantling presumably based on the characteristics of the job and efficiency. Indeed there is no suggestion that Chalmers excluded labourers in a discriminatory manner with respect to carpenters, operating engineers, or teamsters.

4. There is no argument that tending lies at the core of the work performed by labourers. This core work was established many years ago because the work could generally be performed more economically and efficiently using "a common labourer" rather than a journeyman tradesman to perform the more menial work. However, there was never any intention of using labourers in this capacity when there was not enough work to justify a labourer doing the tending. It became more difficult to justify over the last several years when the labourers rate moved considerably closer to the tradesman's rate on a percentage basis.

5. The fact that some employers do not always make an objective decision based on economy and efficiency in assigning work should in no way mitigate against another employer attempting to do so. Indeed economy and efficiency are a valid part of the jurisdictional assessment. This is the core of management rights in the assignment of work where there are conflicting claims by two or more parties. If the assignment is not objective, the employer will face the consequences.

6. The majority decision tends to ignore the Memorandum of Understanding between the parties and the management rights clause in the agreement in favour of the jurisdictional claims of the Labourers. It now requires Chalmers to use at least one labourer to tend on all scaffolding erection and dismantling jobs regardless of cost and efficiency but allows Chalmers to determine if any additional labourers need be used as he sees fit.

7. In principle, I find myself in dissent even though the impact may be minimal. This is not a case of the respondent trying to avoid unions but a case of assigning the work efficiently to those unions having contractual relations with the respondent and overlapping jurisdictions.

2831-96-U; 2834-96-U National Automobile, Transportation and General Workers Union of Canada (CAW-Canada), Applicant v. Dover Corporation (Canada) Limited, Industrial Division, Responding Party

Discharge - First Contract Arbitration - Strike - Unfair Labour Practice - Board's earlier direction that first contract be settled by arbitration ending strike - Union and employer disputing return to work obligations - Board making various preliminary rulings at parties' request - Board not accepting union's argument that section 43(14)(b) gives senior employees the right to be returned to any work that they are able to do, even if it is not the same work that they were performing before the strike started - Board finding that section 43(14) applies to require employer to reinstate all employees by seniority, regardless of whether or not they were working at the time the first contract direction was issued - Board rejecting union's argument that section 43(14) provides a guarantee against discharge of striking employees in the event of a first contract direction - Board also finding no statutory basis for requiring employer to justify terminations on either just cause or cause standard per se

BEFORE: *S. Liang*, Vice-Chair, and Board Members *S. C. Laing* and *D. A. Patterson*.

APPEARANCES: *Frank Luce, Craig Grant, Ron Joyal* for the applicant; *James Lenoury and Bob Pearson* for the responding party.

DECISION OF S. LIANG, VICE-CHAIR AND BOARD MEMBER S. C. LAING; June 9, 1997

1. This is an application under section 96 of the *Labour Relations Act, 1995*, alleging violations of various sections of the Act, and an application for a declaration of illegal lockout. The applicant (also referred to in this decision as the “CAW”) was certified to represent a unit of employees employed by the respondent (“Dover”) on June 26, 1995. Following certification, the parties met in collective bargaining, which ultimately resulted in a strike commencing in March of 1996. On November 22, 1996, the Board (in a differently constituted panel) issued a direction for first contract arbitration. The direction, among other things, brought an end to the strike, pursuant to the provisions of section 43(14) of the Act. This application relates to disputes between the parties arising out of the return to work following the end of the strike. The union alleges that the termination of four employees for picket line misconduct is unlawful, and seeks their reinstatement. The union alleges that the failure to return certain machinery to the plant violates the Act. There are disputes between the parties about the proper order in which employees should be returned to work following the end of the strike.

2. At the outset of the hearing, counsel for the company raised several issues with the Board. First, the company requested that the Board hold the hearings into the unfair labour practice complaints in London, which is said to be more convenient for the parties. The Board indicated that generally, whether or not a hearing is held outside of the Board’s offices in Toronto is a matter of administrative policy. Even where the Board has reasons to hold hearings out of town, however, it has not been the recent policy of the Board to travel to London, which is considered reasonably close to Toronto.

3. The company also indicated that it has requested reconsideration of the decision of the Board directing first contract arbitration. Further, it understood that one of the Board Members on the panel making that decision was in process of “finalizing his dissent”. The company did not make any submissions on what this panel ought to do in the circumstances, stating that it was raising this so that this panel could decide how it should act accordingly. This panel sees no reason to delay the determination of the issues before it until the Board has dealt with the reconsideration request. The decision of the panel to direct first contract arbitration is a presumptively valid and final determination. There is nothing before us which casts doubt on this presumption and which leads us to treat that prior decision as anything but conclusive.

4. At the hearing before us, the parties agreed to seek the Board’s preliminary rulings on certain issues before proceeding with the balance of the case. The parties were content to argue these issues without the need for evidence, on the basis of some undisputed facts. Before setting out these issues, we reproduce below the relevant portions of the Act:

1. (2) For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of the person’s ceasing to work for the person’s employer as the result of a lock-out or strike or by reason only of being dismissed by the person’s employer contrary to this Act or to a collective agreement.

43. (14) The employees in the bargaining unit shall not strike and the employer shall not lock out the employees where a direction has been given under subsection (2) and, where the direction is made during a strike by, or a lock-out of, employees in the bargaining unit, the employees shall forthwith terminate the strike or the employer shall forthwith terminate the lock-out and the employer shall forthwith reinstate the employees in the bargaining unit in the employment they had at the time the strike or lock-out commenced.

- (a) in accordance with any agreement between the employer and the trade union respecting reinstatement of the employees in the bargaining unit; or

- (b) where there is no agreement respecting reinstatement of the employees in the bargaining unit, on the basis of the length of service of each employee in relation to that of the other employees in the bargaining unit employed at the time the strike or lock-out commenced, except as may be directed by an order of the Board made for the purpose of allowing the employer to resume normal operations.

(15) The requirement to reinstate employees set out in subsection (14) applies despite the fact that replacement employees may be performing the work of employees in the bargaining unit, but subsection (14) does not apply so as to require reinstatement of an employee where, because of the permanent discontinuance of all or part of the business of the employer, the employer no longer has persons engaged in performing work of the same or a similar nature to work which the employee performed before the strike or lock-out.

(16) Where a direction has been given under subsection (2), the rates of wages and all other terms and conditions of employment and all rights, privileges and duties of the employer, the employees and the trade union in effect at the time notice was given under section 16 shall continue in effect, or, if altered before the giving of the direction, be restored and continued in effect until the first collective agreement is settled.

80. (1) Where an employee engaging in a lawful strike makes an unconditional application in writing to the employee's employer within six months from the commencement of the lawful strike to return to work, the employer shall, subject to subsection (2), reinstate the employee in the employee's former employment, on such terms as the employer and employee may agree upon, and the employer in offering terms of employment shall not discriminate against the employee for exercising or have exercised any rights under this Act.

(2) An employer is not required to reinstate an employee who has made an application to return to work in accordance with subsection (1),

- (a) where the employer no longer has persons engaged in performing work of the same or similar nature to work which the employee performed prior to the employee's cessation of work; or
- (b) where there has been a suspension or discontinuance for cause of an employer's operations, or any part thereof, but, if the employer resumes such operations, the employer shall first reinstate those employees who have made an application under subsection (1).

5. The first issue which the parties placed before the Board was the appropriate interpretation of section 43(14)(b). In this workplace, as is not uncommon following a long strike, there will be a gradual return to normal production during which time not all employees will be required at once (for ease of reference, the Board will refer to this period of time as "the start-up"). This section anticipates that in such circumstances, decisions may have to be made as to the order in which employees will return to work. The union's position is that the Act requires the employer to reinstate employees by seniority across the bargaining unit. It argues that section 43(14)(b) gives senior employees the right to be returned to any work which they are able to do, even if it is not the same work they were performing before the strike started.

6. Counsel for the employer submitted that section 43(14) is only intended to provide guidance to the parties in a temporary situation, i.e. the return to normal production after a strike. Given the temporary situation to which the provision speaks, it is submitted that the Board should not give an interpretation that will make the process of returning to normal production complicated or laborious or that will increase the possibility of disputes and litigation. The union's arguments lead to all of this, since the union's interpretation would require an employer to engage in a process of continuous bumping and an ongoing assessment of the skills and abilities of its employees during the start-up

period. Every stage during the start-up that more work becomes available, the employer would be obliged to look at the most senior people in its workforce and assess whether they are capable of performing the work. In the employer's submission, the return to employment required by section 43(14) is a return to employment within the job classification held before the strike.

7. The specific context of the interpretation dispute in this workplace relates to the entitlement of machine operators to be returned to the duties of assemblers during the start-up period. The workforce at this plant primarily consists of machine operators and assemblers. There is also one shipper and one maintenance person. The union asserts that, generally, employees are hired as assemblers. Once they acquire the skills and receive the training, they may become machine operators. Machine operators receive higher pay. In the past, when there wasn't work available on machines, machine operators might do assembly work. There is no dispute that machine operators are capable of doing assembly work. Two machines which were moved out of the plant during the strike have not yet been returned. For the moment, therefore, there is less machine operators' work available than there are machine operators to perform that work. Meanwhile, there are some assemblers who are back at work who have less seniority than two machine operators who are still waiting to return. It is the company's expectation and goal that as production returns to capacity, all striking employees will be recalled. Its position is that until there is more work for machine operators, it is not compelled to recall these two machine operators. The union's position is that these two machine operators should have been recalled to perform assembly work, ahead of the more junior assemblers. The issue is therefore whether section 43(14) requires the employer to displace the assemblers with the machine operators.

8. We find that in the context of this workplace, the employer is not in violation of section 43(14)(b) by failing to place more senior machine operators in assembler's positions during the start-up. In arriving at this conclusion, we find that the language of section 43(14)(b) does not require either a comparison of seniority across the bargaining unit in all cases, or a comparison of seniority across classifications in all cases. It simply requires that employees be returned, by order of seniority, to the "employment they had" at the time the strike or lockout commenced.

9. The term "employment they had" contains at least two distinct ideas. First, it refers to the idea of active duties. Because of section 1(2) there is no question about the employment status of persons engaging in a strike. The return to employment set out in section 43(14) does not therefore refer to the reinstatement of *employee status*. Rather, it refers to the return to active duties of those who had not been working because of a strike or lockout. Second, the words "employment they had" refer to what an employee was *doing* prior to the strike. It requires, essentially, a return to normal conditions, and it is supported by the statutory freeze in section 43(16). Both sections 43(14)(b) and 43(16) provide an assurance that employees will not suffer detriment as a result of a strike or lockout. It would not be consistent with this, for instance, to return employees to active duty, but in substantially different duties than those they were performing prior to the strike. It would also therefore not be consistent with this to read section 43(14)(b) as requiring an employer to have reference to *any* work an employee is potentially capable of performing, whether or not it was part of the work he or she did prior to the strike.

10. As we have stated, it is unnecessary for us to determine whether this always means that seniority is to be measured within a classification. Workplaces vary greatly in work organization, employee mobility and flexibility. There will be some workplaces where classifications mean little, and there is much fluidity amongst the employees as to the work performed at any given time. In other workplaces, there may be much less movement amongst groups of employees, where the work of different classifications remains more separate. Although section 43(14)(b) should not be read to require the imposition of a bargaining unit wide seniority principle for the purposes of the return to normal production, neither is it necessary to read it to rigidly correspond to work classifications. The first

portion of section 43(14)(b) speaks of the “employment” an employee had at the time the strike or lock-out commenced, which may in a given circumstance be broader than a specific classification. The parameters of “employment” within the meaning of this section will depend on the facts of a given workplace.

11. We agree with the employer’s submission that where faced with a choice between alternative interpretations of this provision, the Board should favour that which is more simple to understand and implement and which does not invite disputes. We find that the interpretation urged on us by the union has the potential to lead to the imposition of an unwieldy process of shuffling and re-shuffling employees and a continuous assessment of skills and abilities over the course of the start-up period following a strike. It is unlikely, in our view, that such a result was intended by the Legislature, given the temporary circumstances in which this section will have any relevance. The availability of a Board direction under section 43(14)(b) does not provide an answer to this, since it is only available in what we consider to be narrow circumstances, “for the purpose of allowing the employer to resume normal operations”. In any case, the union’s interpretation is not one to which we are led by the words of section 43(14), as we have outlined above.

12. Applying our reading of section 43(14) to the facts before us, on balance, we cannot conclude that the assembly work was “employment [the machine operators] had at the time the strike..commenced”.

13. It was also argued by the union that on an application of section 43(16), the Board can find that the past practice at this workplace is that machine operators do assembly work. We do not find the reference to section 43(16) to add anything to the arguments above, and it therefore does not change our finding in this case.

14. The second interpretation issue which the parties placed before us concerns the relationship between section 43(14) and section 80 of the Act. It concerns the relationship between the rights of employees who worked during the strike, and the rights of employees returning at the conclusion of the strike. It is the employer’s position that to the extent that it may not require all employees immediately during the start-up period, it is entitled and obliged to retain employees who returned to work during the strike. It submits that these persons cannot be displaced by employees returning to work pursuant to section 43(14), even if the latter have more seniority. The employer argues that section 80(1) is a grant of rights to employees who decide to return to work within the first six months of the strike. As long as the conditions set out in that section are met, these employees have a right to work. This right is nowhere specifically made subject to section 43(14). Thus, if there are otherwise employees who also have a right to return to work under section 43(14), section 80 should prevail. The employer further submits that section 43(14) speaks of “reinstatement”, and contains a notion of return to active employment. It does not affect those employees who have already returned to active employment by exercising rights under section 80. These employees have no need of “reinstatement”.

15. In the union’s submission, section 80 does not provide a guarantee of indefinite employment. It is meant to govern in a temporary situation, and is subject to other statutory or contractual limitations. For example, section 80 allows an employer and a returning employee to agree to individual terms of employment. Clearly, this will be displaced by the terms of any collective agreement. Also, section 43(16) provides for a return to pre-negotiation terms and conditions of employment upon the grant of a first contract direction. Again, whatever individual terms have been negotiated with respect to a returning employee, they must give way to this specific statutory direction.

16. The union also submits that the purpose of section 80 is to ensure that striking employees not lose their jobs to replacement workers hired during a strike. Its purpose is to give returning bargaining unit members priority over replacement workers, not to give bargaining unit members who returned to work during a strike priority over those who did not.

17. We find that the interrelationship between section 80(1) and section 43(14) of the Act does not give employees who have returned to work during a strike a right to remain where there are more senior employees returning to work after the strike.

18. The purpose of section 80(1) has been described by the Board as an assurance to striking employees that they will be reinstated to their former employment (as long as the conditions in that provision are met), even if that requires the displacement of replacement workers who were hired during a strike. Without the protection of section 80(1), and in the absence of a negotiated back to work protocol, returning strikers do not have a guarantee of reinstatement (assuming no unfair labour practices by the employer in making its decisions about reinstatement): see *Becker (the Milk Company Limited)*, [1977] OLRB Rep. December, 797, *Mini-Skool Ltd.*, [1983] OLRB Rep. September 1514, and *Shaw-Almex Industries Limited*, [1986] OLRB Rep. December 1800.

19. Section 80(1) is a guarantee of reinstatement both where an employee “crosses the picket line” to return to work during the strike, and where an employee returns to work upon the resolution of a strike.

20. Section 43(14) is also a guarantee of reinstatement, upon the direction of first contract arbitration by the Board. Further, where not all employees return to work at once because there is a gradual return to normal production, section 43(14) allows the union and the employer to set the terms of this return to work, or in default of a back to work agreement, requires the seniority principle to govern.

21. If section 80(1) is read to guarantee the continued employment of persons who have returned to work prior to the end of the strike, then there is a conflict between the rights of employees who have returned to work under section 80(1) and those who have the right to return under section 43(14), where there is not enough work immediately available. Junior employees who returned to work under section 80(1) will have a continuing right to remain at work. Yet senior employees have a greater right than junior employees under section 43(14), where there are not enough positions for all during the start-up period.

22. An answer to this dilemma is in the application of the principle of statutory interpretation that where there is a conflict, the specific shall prevail over the general: see for instance, *Dreidger on the Construction of Statutes*, 3rd edition. Section 80(1) applies generally to all strikes, whereas section 43(14) applies to strikes which have ended as a result of a first contract direction. To the extent that section 43(14) establishes a specific regime for determining who has an entitlement to return to work first following the conclusion of a strike, which may be at odds with the rights contained in section 80(1), the provisions of section 43(14) prevail.

23. Another approach is to seek an interpretation of the two provisions such that they do not directly conflict. We find that this can be accomplished in this case because, in our view, the system of rights contained in the Act as a whole, and as interpreted by the Board’s decisions, lead to the conclusion that the terms of the employment which is established by resort to section 80(1) are not absolute but subject to certain limitations, both contractual and statutory. On this interpretation, the rights provided in section 80(1) do not prevent the displacement of persons who returned to work during a strike by more senior striking employees returning pursuant to section 43.

24. Firstly, section 80(1) allows the negotiation of individual terms of employment between a returning individual and an employer. This is an exception to the fundamental principles of exclusive bargaining agency and collective bargaining on which the Act is premised. To be consistent with these principles, whatever terms are individually negotiated between an employee who has crossed a picket line to return to work and an employer must be superseded once a collective agreement is reached. The situation is the same where a collective agreement is not reached, but a first contract direction is made. Section 43(16) provides that once a first contract direction is made, wages and all other terms and conditions of employment shall be returned to that which existed at the time notice to bargain was given, until a collective agreement is reached. Whatever may have been the situation during the strike, therefore, section 43(16) does not allow for the continuation of special terms of employment negotiated between a returning employee and an employer pursuant to section 80(1) once the first contract direction is given.

25. There is no doubt, therefore, that the terms of employment negotiated during a strike are temporary.

26. Secondly, there is also no doubt that a union and employer are free to negotiate a back to work protocol which may result in the temporary bumping of employees who worked during the strike in favour of other returning employees, for the purposes of the start-up. We know of no case which has questioned the ability of a union and company to negotiate such an outcome as part of a back to work agreement. Indeed, it is implicit in the Board's cases that the parties are entitled to do so. In *Mini-Skool Ltd.*, for instance, the issue before the Board was whether it was an unfair labour practice for an employer to refuse to agree to a back to work protocol in which junior employees working through the strike would be bumped by more senior striking employees. The Board found that it could not infer a discriminatory intent behind the employer's position. It found that the onus was on the union to negotiate such a provision, and in the absence of agreement, it was not illegal of the employer to continue to retain the junior employees until staffing requirements had returned to normal. It was implicit in the Board's decision that it was open to the parties to agree to a back to work protocol which had the effect of displacing employees who had exercised the right to return to work during the strike, in favour of more senior returning employees.

27. In *Mini-Skool Ltd.*, decided in 1983, the Board was unable to find any statutory right of more senior employees to displace junior employees at the conclusion of a strike, where the junior employees had decided to return to work first. The situation before us is very different. Section 43, enacted in 1986, contains just such a statutory right, in the event of a first contract direction. It codifies the seniority principle, in the absence of specific agreement. It does not allow an employer to give any special status to those employees who worked during the strike. We find that section 43(14)(b) places everyone in the bargaining unit in the same position for the purpose of applying the seniority principle, regardless of whether they were working during the strike or are returning to work after the end of the strike.

28. We are supported in this conclusion by the specific reference in 43(14)(a) to a back to work protocol. Just as with any back to work protocol, there is no reason to think that the parties cannot, in negotiating the back to work protocol applicable after a first contract direction, agree to have senior striking employees bump junior employees during the start-up period. Likewise, where the parties have not reached agreement, we do not view the scope of section 43(14)(b) as requiring the exclusion of those same employees from the application of the seniority principle.

29. The employer has argued that section 43(14)(b) was intended only to apply to those employees who were not in active employment at the point at which a first contract direction is given, by the use of the word "reinstate". It is said that "reinstate" implies that this section does not apply to

employees who are already at work. These employees have no need of reinstatement. We do not view the use of the word “reinstate” as determinative of the issue. It must be read in the context of the whole phrase, whose intent is to ensure that employees are put back to the employment they had at the time the strike or lockout commenced. The general purpose of section 43(14) is to facilitate the return to normal production. Again, this only lends support to the notion that, whatever the situation may have been during the strike, upon a first contract direction, things are to be returned to the way they were before. Thus, whatever employees might be doing during the strike, whether working or not, they are to be returned to the position they were in prior to the strike, in accordance with an agreement or the seniority principle.

30. We therefore find that section 43(14) applies here to require the employer to reinstate all employees by seniority, regardless of whether or not they were working at the time the first contract direction was issued.

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31. The final preliminary issue before us relates to the argument by the union that four employees who have been terminated for picket line misconduct ought to be reinstated forthwith, and the entitlement of the employer to terminate their employment litigated on a “just cause” principle.

32. It was argued by the union that section 43(14) requires the reinstatement of all employees to their employment. There is no exception. An employer is entitled, pursuant to 43(16) to impose discipline for strike-related misconduct, but cannot refuse reinstatement. Once the collective agreement has been settled, the employer can then decide whether or not to take further action in accordance with the standard for discipline and discharge set out in that collective agreement. In effect, section 43(14) is a “no reprisals” provision, pending the collective agreement. In the alternative, if section 43(14) does not provide an absolute right to reinstatement, then the only way to reconcile the substantive right to reinstatement found in 43(14) with the employer’s right to impose discipline under section 43(16) is to find that the employer may not terminate the employment of a striking employee, except for just cause. Even under the common law, which governed these employees’ employment before the collective bargaining regime is invoked, there can be no termination of employment without cause or notice. Here, there was no notice. The Board should therefore determine whether there was cause for termination.

33. The Board was referred to its decision in *Muskoka Board of Education* [1996] OLRD No. 3369 [unreported decision] where the Board found (in a differently constituted panel) that in the absence of a collective agreement but at a time when a statutory freeze was in force, an employee’s right to challenge his dismissal was governed by the common law, through a civil action. In that decision, the Board relied on *Burlington Carpet Mills Canada Ltd.*, [1980] OLRB Rep. Oct. 1361, a case where an employer discharged an employee at a time when the parties were negotiating for a first collective agreement, and a statutory freeze was also in force. In *Burlington Carpet Mills*, the parties agreed that there was no illegal motive behind the discharge. The union sought to have the discharge reversed on the basis that it was without just cause. The Board found that the Act did not support the conclusion that it could apply a just cause standard to a review of the discharge.

34. We are unable to agree with the union’s argument that section 43(14) of the Act provides a guarantee against discharge in the event of a first contract direction. We do not view the right to reinstatement contained in section 43(14) as displacing any rights an employer may have had in law to terminate the employment of an employee. It is arguable that where an employer decides to discharge an employee before going through the recall protocol in section 43(14), that employee is no longer an “employee in the bargaining unit” to which section 43(14) applies. Even if section 43(14) may be read as requiring reinstatement of all employees who were employed at the time the first contract direction was issued, before action such as discharge is taken, we do not read this section as prohibiting an

employer from discharging an employee after going through the recall protocol. In essence, we do not view the section as providing a guarantee of continued employment. Neither do we read it as requiring the recall of employees whom an employer has lawfully discharged.

35. We now turn to the union's alternative argument that even if an employer is not prevented from discharging an employee because of section 43(14), it can only do so where there is "just cause". We do not find section 43(14) helpful in answering this issue. As we have stated, the presence of 43(14) does not limit any rights an employer may otherwise have had in law to terminate employment.

36. On this issue, we find the reasons of the Board in *Muskoka Board of Education* and *Burlington Carpet Mills* to be applicable to an extent. In both of those cases, the Board found that the statutory freeze did not incorporate, in the absence of a pre-existing collective agreement, a "just cause" requirement for the termination of employment. In *Burlington Carpet Mills*, the discharge occurred during the negotiation of a first collective agreement. In *Muskoka Board of Education*, the discharge also occurred during the negotiation of a first collective agreement between the employer and a union. However, there had been a prior collective agreement which was terminated as a result of termination of bargaining rights approximately one month before the new bargaining agent was certified. In that case, the union argued that although at the time of the discharge, the employees' employment rights were governed by the common law, the content of the individual contracts of employment included the substantive terms of the expired collective agreement. The union argued that the protection against discharge without just cause was incorporated into the individual employment contract of all employees. The Board rejected this argument, finding that the "just cause" protection did not survive the termination of the previous collective agreement.

37. To the extent that the above cases stand for the proposition that prior to the negotiation of a first contract, there is no requirement that a discharge be for "just cause", we find them applicable to the case before us. Although an important decision, we do not find *Royal Oak Mines Inc. v. Canada Labour Relations Board et al.*, (1996) 133 D.L.R. (4th) 129 (S.C.C.), relied on by the union, helpful on this issue. We do not read it as establishing that the Board is required to impose a "just cause" standard in assessing terminations of employment in the absence of a collective agreement.

38. The union has also argued that at the very least, the Board ought to assess whether there was cause for termination, since the common law regime governing employment in this workplace requires cause for discharge where there is no notice. We take the union's argument to be a reference to the position taken in its pleadings that these terminations are in breach of the statutory freeze in section 43(16) of the Act.

39. This was an argument which was not directly addressed in either *Muskoka Board of Education* or *Burlington Carpet Mills*. In *Muskoka Board of Education*, the issue was whether the Board ought to apply a "just cause" standard to the assessment of the discharge. The Board further specifically makes note of the fact that the union did not assert (apart from its argument about "just cause") that the employer had acted in a manner inconsistent with the prior operation of its business. It is in this context that the Board found that the employee's avenue to challenge the correctness of the employer's reason for discharge was in civil court, and not at the Board. In *Burlington Carpet Mills*, as well, the union did not assert that the discharge in question was contrary to the company's established practice. There are numerous Board decisions which have considered issues of termination of employment during the statutory freeze prior to a first contract, many of which have dealt with layoffs from employment. In keeping with the Board's general approach to the statutory freeze, the Board has in all of these cases considered whether the employer's actions in terminating employment were consistent with the existing pattern of business.

40. The inter-relationship between an employee's common-law right not to be terminated without reasonable notice or cause and the rights protected by a statutory freeze, is a difficult issue. It is not at all clear that an assessment of whether or not an employer has violated a statutory freeze before a collective agreement is in effect requires the Board only to determine whether there was cause for the terminations. It is arguable that a "cause" standard and a "business as usual" standard are quite different things. It is not necessary at this point to explore this issue further however.

41. It is sufficient for the purposes of dealing with the parties' preliminary submissions to indicate the following. The Board finds that there is no statutory basis for requiring this employer to justify the terminations on either a just cause or cause standard *per se*.

42. However, to the extent the union has pleaded a prior business practice of terminations for cause, the existence of cause, while not the only issue, may be relevant to assessing whether there has been a violation of the statutory freeze.

43. The matter is referred to the Registrar for the purpose of setting dates for the hearing of the remaining issues. The panel is not seized.

DECISION OF BOARD MEMBER D. A. PATTERSON; June 9, 1997

1. I disagree with the majority's interpretation of section 43(14)(b). I would have held that that section requires the employer to reinstate employees back onto the payroll upon the termination of a strike or lock-out resulting from a first contract direction, and then return them to work by seniority across the bargaining unit to any work that they are able to do.

2. In this case, there are two classifications of workers, one of which is qualified to do the work of the other. In these circumstances, which are by no means unique, it would be a straight forward process for the employer to reinstate the employees by seniority across the bargaining unit. The concerns of the majority that this would result in a process of continuous bumping and an ongoing assessment of employees' skills and abilities simply would not materialize in this case.

3. If, in other circumstances, the application of what I believe to be the correct interpretation of section 43(14)(b) would create a complicated process for returning to normal production, the employer would be entitled under section 43(14)(b) to seek an order from the Board directing that the "build-up" occur in another manner. In deciding whether to issue such an order, the Board should, I believe, weigh the interests of each party, and mere administrative inconvenience to one party should not be determinative of that issue.

4. In fact, I believe that because of the presence of that option in section 43(14)(b), the majority's interpretation cannot be correct since it essentially renders that legislative option redundant. I cannot envision a scenario where resort to the Board would be needed if employees are returned to work in line with the majority's interpretation. While certainty and the desire to minimize resort to litigation are valid goals, we should not strain the language of the statute to achieve them at the expense of other rights, particularly when it goes against the critically important principle of seniority. To do so creates an impression of unfairness in the minds of employees that they are being penalized further for supporting the strike.

5. On the issue of the four discharged employees, I would have held that since, in my view, section 43(14)(b) requires that all employees be reinstated to the payroll upon a direction that a first contract be settled by arbitration, the four employees must be returned to the payroll. The employer may, pursuant to section 43(16) impose discipline, but it cannot refuse to reinstate the employees; only once a collective agreement has been reached can the employer, applying the standard that the collective

agreement sets out, discharge the employees. In any event, I believe that the issue of the fate of the discharged employees has been placed before the Board of Arbitration, in which case I would consider that that Board has authority under section 43(12) to deal with it.

3510-95-U; 2359-96-U; 2360-96-FC; 2990-96-R Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C., Applicant v. **Fort William Clinic**, Responding Party; Sharon Coslett and Marnie MacMillan, Applicant v. Service Employees Union, Local 268 Affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C., Responding Party v. Fort William Clinic, Intervenor

Change in Working Conditions - First Contract Arbitration - Intimidation and Coercion - Interference in Trade Unions - Termination - Unfair Labour Practice - Board finding breach of statutory freeze in respect of failure to pay Christmas bonus, but not in respect of failure to hold annual Christmas party - Board finding employer's letter to employees coercive and designed to undermine union's bargaining authority, and that employer otherwise seeking to interfere with exercise of employees' rights by intimidation and coercion - Board finding that collective bargaining unsuccessful because of refusal of employer to recognize union's bargaining authority, because of uncompromising nature of employer's bargaining positions without justification, and because of failure to make reasonable and expeditious efforts to conclude a collective agreement - Board directing that first agreement be settled by arbitration and that pending termination application be dismissed

BEFORE: *Gail Misra*, Vice-Chair.

APPEARANCES: *Glen Chochla* and *Glen Oram* for the Service Employees Union, Local 268; *Fred Bickford* and *John Johnson* for the Fort William Clinic.

DECISION OF THE BOARD; June 11, 1997

1. Board File Nos. 3510-96-U and 2359-96-U are section 96 complaints filed by the Service Employees Union, Local 268 (the "union") claiming violations of the *Labour Relations Act, 1995*. Board File No. 2360-96-FC is an application for first contract direction, pursuant to section 43 of the Act, filed by the union on November 7, 1996. Board File No. 3701-95-U is a section 96 complaint filed by the Fort William Clinic (the "employer" or the "Clinic") claiming union violations of the Act. Board File No. 2990-96-R is a termination application filed by a group of employees of the Fort William Clinic on December 10, 1996, which has been deferred until after a decision has been reached in the first contract case.

2. The employer chose at this time not to pursue Board File No. 3701-95-U, so that matter is adjourned *sine die* for a period not exceeding one year. Unless within that time either party requests that the Board proceed with the matter, it will be terminated. The parties agreed that any evidence led in these proceedings which may be relevant to the employer's application will be considered should this file be reactivated. I will remain seized of this matter.

3. Twenty one days of hearing were held between November 28, 1996 and May 7, 1997 in order to hear the first contract application and the two union section 96 applications. The parties agreed to waive the provision in section 43(1) of the Act for the first contract application to be heard and decided within 30 days of the date of application.

4. Given the numerous issues raised by the parties to be dealt with by the Board and the vast quantity of evidence heard, this decision has been divided into sections so as to address key questions. While there have been various characterizations given to meetings and events, there is not much dispute about what transpired. The facts as I have found them are outlined in each section. Where it has been necessary to decide whose version of events I am accepting, I have indicated why I prefer the testimony of one witness over another.

Reconsideration of Board's January 29, 1997 decision

5. On December 24, 1996 a decision issued in Board File No. 2990-96-R, the termination application filed by a group of employees. For reasons outlined in that decision, the Board was of the view that it was most appropriate in the circumstances of this case to continue to hear the first contract direction application so that the parties to that application would have a resolution to that matter before the Board embarked on a consideration of the termination application. Thereafter, on January 27, 1997, the employer made a non-suit motion on the first contract application. On January 29, 1997 the Board issued a decision denying the non-suit motion. Following the release of that decision the Board received requests for reconsideration from counsel for the termination applicants and the employer. On February 4, 1997 I ruled orally that I would not be reconsidering my decision. The following are my reasons for that ruling.

6. By letter dated February 3, 1997, counsel for the employer argued that the decision was based on a patently unreasonable finding of fact and that the Board had made an error in its interpretation of section 43. Counsel argued further that the standard of scrutiny on issues of law is one of correctness. Mr. Bickford believed that the Board's findings led to a perception of unfairness.

7. Peter Hollinger, acting for the termination applicants, also wrote to the Board on February 3, 1997 saying he was "surprised" that he had not had the opportunity to appear to argue the non-suit motion and that there had therefore been procedural unfairness at this juncture. Hence he too was seeking reconsideration of the Board's decision. Following Mr. Hollinger's letter to the Board, the Board received a letter from Mr. Bickford stating he too was making this argument in support of his reconsideration application.

8. Dealing first with Mr. Hollinger's argument, Mr. Hollinger was clearly told by the Board on December 19, 1996 that the Board does not inform interested parties who choose not to attend at the hearing of when any argument will be heard. Indeed, the Board does not know when a motion may be made in which any absent interested party may feel it has an interest in. It is the duty of those interested in a proceeding to make themselves available and there is *no obligation* on the Board to give parties a running commentary on what is happening. Hence, had Mr. Hollinger been interested in the Board proceedings he had the option of attending at the hearing, or of keeping in touch with counsel for the other parties about what was happening. In that regard, it is noteworthy that the Board did not at any point make the termination applicants a party to the first contract application. It simply indicated that they were free to attend should they wish to do so. For these reasons, there was no legitimate basis requiring me to reconsider my decision.

9. I will now deal with the employer's other grounds for seeking reconsideration. In the decision on the non-suit motion the Board indicated it was applying the standard of proof of a *prima facie* case. No findings of fact were made and the Board simply indicated it was satisfied that there was some evidence before it upon which the union's application could be sustained. If the employer is dissatisfied with the Board's decision because it believes the Board has incorrectly interpreted the statute or has been patently unreasonable in its findings of fact, it is open to it to seek judicial review. A reconsideration application on these grounds is inappropriate.

10. Finally, the Board considered the employer's argument that there was a perception of procedural unfairness because the Board had made "findings without any evidentiary basis". This argument is completely without merit. When the Board informed the parties that it would consider the employer's non-suit motion, it let the employer make this motion *without putting the employer to its election* about the calling of evidence. The Board also informed the parties that it would not make any statements in its decision about the evidence so as to give one side a "half-time score". As noted earlier, the Board made no findings of fact in its decision of January 29, 1997. Thus, the Board was of the view there were no grounds for a perception of unfairness in this case.

11. For all of the above reasons the Board declined to reconsider its decision of January 29, 1997.

General Background

12. The Fort William Clinic is a medical clinic providing health care to the general public on a for-profit basis in the city of Thunder Bay. It has been in operation for more than 50 years. The Clinic comprises a partnership of general practice and specialist physicians, and associate physicians.

13. The Service Employees Union, Local 268, was certified on an interim basis to represent all of the employees of the Clinic on May 30, 1995. The union and the Clinic resolved their dispute with respect to the status of two individuals, and the Board issued a final certificate to the union on July 14, 1995. The union gave the employer written notice of its desire to bargain a first collective agreement on June 12, 1995.

Board File No. 3510-95-U, Section 96 Application filed by the Union on December 27, 1995

14. This application made by the union initially contained a number of allegations of violations of the Act. However, early in the hearing the union withdrew all except two allegations and it is with respect to those matters that the Board heard evidence. The union alleged that for at least 15 years prior to November 22, 1995, the employer had given all employees a cash bonus at Christmas time, and had held a Christmas party for all staff, doctors, and their respective partners and spouses. However, on November 22, 1995 the employer advised the union it would not be paying the Christmas bonus, and would not be holding the Christmas party that year. The union claims that through this decision the employer has altered the terms, conditions, rights and privileges of the employees, contrary to section 86 of the Act, and has breached sections 5, 70, 72, and 76 of the Act.

15. The Clinic's position is that the Christmas bonus and party were discretionary items which were decided upon by the Clinic partnership annually, so that they were not working conditions of the sort contemplated by the Act. In addition, since the Clinic was experiencing serious financial constraints at that time, the Christmas bonus and party were only two of a number of cost-cutting measures taken by the partnership. Thus, it is argued that the Clinic has *bona fide* business reasons for exercising its discretion as it did, and it did not act contrary to the Act. Rather, it is suggested, the employer itself has protection pursuant to section 86 to protect *its* rights and privileges, and the decision to grant the Christmas bonus and hold the party were within the ambit of its privilege.

16. In order to establish the financial constraints the employer was under there was a fair amount of evidence led about the effect of the imposition of the *Social Contract Act* on physicians in Ontario such that it resulted in "caps" on and "clawbacks" of fees from April, 1993 to March 31, 1996. Thus there were to be expenditure targets (caps) for the total billings of Ontario physicians, as a group, and if those targets were not met, there would be clawbacks from physicians' fees so that the government targets could be met. As a result of this regime a lot of physicians left Ontario for the United States, and apparently continue to do so to the present. The loss of doctors in the Thunder Bay area is more acute

because it is already a designated underserved area. Thunder Bay was also the first area chosen for the downsizing of hospitals and the reduction in hospital beds, thus making it a less desirable location for doctors to practice. When hospital beds are reduced there is less operating room time allocated to specialist physicians, thereby reducing their ability to work and collect fees based on the Ontario Health Insurance Plan ("OHIP") Fee Schedule. All of the Thunder Bay medical clinics experienced a loss of physicians as a result of these governmental actions. The Fort William Clinic has lost between five and eight doctors since 1993. The Spence Clinic has lost 8 doctors, and the smaller Thunder Bay clinics have lost a total of 10 to 12 doctors.

17. In March, 1995 the Ontario Medical Association ("OMA") informed its members that as a result of expenditure targets having been exceeded there would have to be a diminution in billings. It suggested that physicians reduce utilization by closing their offices or clinics on certain days. In the Thunder Bay area the OMA suggested that there be four "District Rae Days" held for this purpose. The Fort William Clinic closed for one or two days that year thereby losing two days of revenue. From 1993 on, it had also closed for four "decentralized clinic" days per year, which were local association educational days held on Fridays for the physicians. Prior to that time the Clinic had remained open for staff on decentralized clinic days, so that they could do work which it was difficult to get done on busy regular days. However, after the imposition of the Social Contract, the Clinic closed on decentralized clinic days and staff had to either take a vacation day, use banked hours, or go without pay for those four days a year. These days were also intended to lower utilization for the physicians. It seems that while utilization would go down as a result of the Clinic being closed, there would be a heavier schedule of appointments on the day before and the day after as patients would need to see the physicians who had been unavailable on the "Rae Day" or the "Decentralized Clinic Day". This phenomenon is also generally observed after weekends when the Clinic is only closed for two days. Nonetheless, it seems that total revenues from billings would be reduced as a result of the Clinic closing for decentralized clinic days and "District Rae" days.

18. In addition to the days the Clinic was closed, there were changes made to the Fee Schedule so that certain services which previously had been covered by OHIP were de-listed, and others had their fees reduced. The Clinic suffered adverse consequences as a result because it could not collect the fees from individual patients, and its bad debts went up. Income was reduced by the bad debts and because many patients simply chose not to have a procedure done if they had to pay for it.

19. As a result of physicians leaving the Clinic, between May, 1995 and May, 1996 the Clinic laid off four full time employees who had been Doctor's Assistants, thereby cutting its overhead costs. Between the time of certification and November, 1996 the staff were reduced from 50 employees to 39 employees. These layoffs were due to the number of physicians who had left the Clinic and included Medical Records Clerks, Doctor's Assistants and a Medical Dicta Typist.

20. The Clinic Executive Director, John Johnson, sets an annual budget for the Clinic and then reports to the partnership monthly about how the finances are in relation to the budget forecast. Decisions are made about expenditures and reductions in expenditures based on the progress of the budget.

21. It is of particular importance to the Clinic to keep its expenditures under control because of the impact they have on the total overhead for the Clinic. When recruiting new physicians to the Clinic one of the most important questions posed by prospective physicians is the ratio of expenditures to income. The various Thunder Bay clinics are very competitive in this respect because the extent of overhead affects the amount of profit a clinic makes, and hence, how much the partners can earn. In 1995 the Clinic had lost a number of physicians so that the remaining physicians, both partners and associates, had to absorb an increasing proportion of the cost of the Clinic overhead.

22. The percentage of overhead of the Clinic represents the difference between the total of the billings and other income to the Clinic, the Clinic expenses, and the income of the physicians. For example, an associate physician works in that capacity for one year before entering the partnership. During that year the person receives a 60:40 split, with 60% of his/her billings going back to the physician as income, and 40% being allocated to overheads. Partners generally have a split of between 35 and 55% for overheads, and the remaining percentage as income, depending on the type of practice.

23. In June, 1995, in order to set the annual budget and deal with diminishing income from OHIP billings, all partners of the Clinic were asked to come up with cost-saving ideas to be presented to the Finance Committee of the Clinic at its July meeting. Many ideas were presented, and two lists were developed. The first list included those ideas which the Committee would recommend that the partnership implement. The second list contained ideas which required further work or development. The Finance Committee made its recommendations to the September, 1995 partnership meeting. Some of the recommendations adopted by the partnership included not offering the Christmas bonus, not having the Christmas party, withdrawing the Clinic's sponsorship of the McKellar Hospital Physician Golf Tournament, not renewing magazine subscriptions, and changing the travel policy for physicians so that they would only be paid for one trip out of town, instead of the former two trips, per year. Ideas accepted for further study included reviewing and increasing non-covered medical procedures, selling parts of the Clinic real property, and planning other uses for the vacant space left in the Clinic building by departing physicians. The partnership apparently considered the Christmas bonus and party as discretionary items, although this view had never been communicated to the employees, who had been receiving the bonus and attending the party for at least 15 years.

24. From 1992 up to and including 1995, the issue of the Christmas bonus went to the partnership of the Clinic each year sometime between October and December. According to Mr. Johnson, the partners would decide whether a bonus would be given, and if so, for how much. It appears that for at least 13 years the Clinic had paid a bonus of \$75 to each employee. In October, 1992 the decision was made to increase the bonus to \$100 per employee. The bonus would be given out on the last working day before Christmas, at a small employee luncheon held at the Clinic. One physician would dress up as Santa Claus and would then call up each employee and give her the bonus (cash in an envelope) and her gift from the employee gift exchange.

25. The Christmas party was also discussed at about the same time as the bonus, or earlier, so that arrangements could be made to book a location for the party. The party is hosted by the Clinic for all staff, physicians, retired employees and physicians, radiologists from McKellar Hospital, staff of the store and laboratory which are housed in the Clinic premises, the cleaning staff, and all of their respective spouses and partners. Since 1992 the party had been held at various locations with differing configurations of an open bar, drink tickets, wine at the tables, etc. Each year a decision was made about what would be done, but the main components of a dinner and dance remained constant.

26. Debbie Karpowich, a union steward and member of the negotiating committee, testified that she and her fellow employees took the cancellation of the bonus and party as a punishment for unionizing. It is noteworthy that the union raised the issue of the rumoured cancellation of the bonus and Christmas party at the first evening of negotiations on November 6, 1995. In a December 7, 1995 letter from Glen Chochla to Fred Bickford after the Clinic decided to cancel the Christmas bonus and party, and after the union had raised its concerns about this decision with the Clinic, the union suggested that the employer hold the party and give the bonus in 1995, and that the parties negotiate about these matters at the bargaining table. That did not happen, and the union tabled a new proposal in January, 1996 during collective bargaining. The new proposal, designed to address issues like those raised by this complaint, stated as follows:

Article 32.01

Superior Conditions: The Employer will maintain any and all superior terms and conditions of employment including but not limited to benefits (monetary or non-monetary), working conditions or wages, which existed prior to the date of certification. "Benefits" includes but is not limited to, payment of the annual Christmas bonus and provision of the annual Christmas party.

* * *

27. Section 86(1) of the Act, commonly referred to as the 'statutory freeze provision' states as follows:

86. (1) Where notice has been given under section 16 or section 59 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) 14 days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated, whichever occurs first.

28. From all of the evidence, it is clear that there was a well-established and long-standing practice of the employer giving employees an annual bonus at Christmas time, and hosting a Christmas party. As noted earlier, the union was certified to represent the Clinic employees in May, 1995, notice to bargain was given in June, 1995, and between September and November, 1995 the employer decided not to give the bonus or hold the party that year. The Clinic did not have the union's consent to change its practice, and section 86(1)(a) and (b) had not transpired. The question the Board must decide in this case is whether the bonus and party are each a right or privilege of the employees which the employer altered, in breach of section 86(1) of the Act.

29. In reaching that decision it is necessary to consider the rationale underlying section 86. As the Board has stated in its decision in *Canadian General Electric*, [1965] OLRB Rep. Dec. 649:

... In our opinion it is manifest that the aim and policy of this section is directed to the protection of the union's bargaining rights and the promotion of meaningful and effective collective bargaining. Once the notice to bargain is given, this section operates to prohibit all alterations without the union's consent, whether they be beneficial or detrimental to the employees concerned, of their wages or other terms or conditions of employment, including any right, privilege or duty of the employer. The section seeks to protect the union's bargaining rights and to promote effective collective bargaining by preserving and maintaining the union's bargaining position for the period stipulated, on the basis of the contracts of employment existing between the employer and the employees on the date of the notice. In other words, the legislation is directed at maintaining the *status quo* of the wages and other terms and conditions of employment existing under the contracts of employment between the employees and their employer, during the particular period of time stipulated in the section. The union is, therefore, given the opportunity, during this time, to enter

upon negotiations and to bargain for a collective agreement, having regard to a fixed point of departure, namely the wages and working conditions existing at the time of notice. In this respect the union's bargaining during this stipulated period will not be undermined nor will it be required to keep pace with and alter its position in accordance with changes in terms or conditions of employment which might otherwise be made as a result of the employer being at liberty to deal directly with the employees. It will be noted that the section gives similar protection to the bargaining position of the employer.

30. The Board has not taken the statutory freeze provision to mean that an employer can make no changes in the course of running its enterprise. As was recognized in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, the employer has the right to manage the business, qualified by the condition that it must manage as it did before the freeze commenced, i.e. "business as before". This may result in the preservation of an entrenched management right, or of an established employee benefit. The Board was concerned that the employer should not be placed in a "legal strait-jacket" by the section 86 interim legal regime, but nor should an employer action lead employees to perceive of themselves as being penalized for engaging in collective bargaining.

31. In *Spar Aerospace* the Board considered an employer argument that the granting of merit increases was discretionary, and therefore not caught by the statutory freeze provision. The Board concluded that there was not a complete discretion because the policy of granting the merit increases had been in existence for a number of years. The Board went on to note that the freeze can extend to cover those elements of an employer's discretion which had hardened into a well-established pattern.

32. The Board has attempted to address situations which may arise during the freeze period such as an unprecedented layoff of employees where there is no anti-union animus found. To address such situations the Board has developed the "business as before" test to include a consideration of the "reasonable expectations of employees". In *Simpsons Limited*, [1985] OLRB Rep. April 594, the Board articulated this test as follows:

33. The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one: what would a reasonable employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer. The reasonable expectations test, though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur every day. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would reasonabl[y] expect such an occurrence during the freeze. ...

33. The Board in *Simpsons* went on to note that employers would be expected to respond to changing economic conditions, through hiring, terminations, or the attrition of employees, and that this would be a reasonable expectation of employees where there had been a significant downturn in business. The Board found that the magnitude of the employer response must be proportional to the severity of the economic circumstances. The Board went on to state that, where relied upon by the employer, economic justification must be proven, and there must be an absence of anti-union animus (see para. 35). During the freeze period an employer cannot introduce a new means of responding to economic difficulties, as that introduction of a new means would likely be outside the reasonable expectations of employees, and may be found to be a breach of section 86 (see para. 38).

34. Even in cases where the Board has accepted that an employer may have good business reasons for altering a working condition, right, or privilege, it has recognized that the employer's freedom to manage its operations in the most efficient manner must be balanced against the right of the trade union to have the employment relationship which is the subject of negotiations stabilized during the period of the freeze (see *Rest Haven Nursing Home*, [1979] OLRB Rep. June 554, at para. 15).

* * *

35. The first consideration is whether the Christmas party and bonus are “any other term or condition of employment or any right, privilege or duty, of the employer”. Having reviewed the submissions of the parties and the evidence before me I am of the view that there is a difference in character between the Christmas bonus and the Christmas party.

36. The Christmas party was an event hosted by the partnership for both employees and outsiders. There was a regular consideration of where it would be held, who would be invited, and the type of function it would be. It was not inherently related to the employment relationship, but was rather more in the character of an act of goodwill by the Clinic for both its employees and others with whom it had dealings during the year. I am therefore of the view that the Christmas party was not the type of right or privilege contemplated by the Legislature as being caught by the provisions of section 86 of the Act.

37. The bonus is a monetary item, of a different character, which could well have been a part of the negotiations for a first collective agreement since it may legitimately be seen as part of the monetary package employees received prior to certification. While it may have been viewed by the employer as a discretionary item, it had been given to employees every year for over a decade. As such the granting of an annual bonus had hardened into a well-established pattern.

38. On all of the evidence before me I am satisfied that from 1993 on, as a consequence of the imposition of the *Social Contract Act*, the Clinic experienced some negative financial consequences. However, there is a dearth of evidence before me to prove that the employer was in such financial straits that it could no longer afford to give its fewer than 50 employees a bonus of \$100 each. As the Board observed in *Simpsons Limited*, cited above, the magnitude of the employer response must be proportional to the severity of the economic circumstances, and economic justification must be proven. From the financial information provided to the Board by the Clinic (the BDO Dunwoody document) it would appear that from 1993 to 1996 the average medical fees rendered per doctor went down and that the average expenses per doctor went up. However, since the Board was not provided with any financial statements or actual figures regarding total income and expenses it is difficult to reach any conclusions. The Clinic only provided bar graphs and some ratios, and then only with respect to billings, so that it is unclear to the Board if there was income from other sources like rent from the medical laboratory and the store in the Clinic building.

39. In addition, the evidence suggests that the employer had reduced its costs from 1993 on by closing the Clinic on decentralized clinic and Rae days, and by shifting the cost of employee wages onto the employees themselves by having them either use banked hours, vacation time, or take unpaid time on those days.

40. In 1993 and 1994 the employer did not stop paying the Christmas bonus, despite the alleged falling revenues and rising expenses. Yet, after the union was certified in 1995, it cancelled the payment of the bonus. It is not surprising that in these circumstances the union and the employees themselves believed that the employees were being penalized for choosing to participate in collective bargaining. That is precisely the concern that the Board wished to avoid in *Spar Aerospace*, cited above, by balancing the employer’s right to continue to run its business and the union’s right not to have its bargaining position undermined. In this case I am of the view that the employer, by cancelling payment of the Christmas bonus, was introducing a new means of responding to its alleged economic difficulties, after it had already had years in which it had apparently also experienced economic difficulties.

41. In the circumstances of this case, and based on the evidence before it, I am of the view that the situation facing the Clinic in late 1995 was not a first time event, and it was therefore not within the

reasonable expectation of the employees that they would not get their annual bonus. By deciding not to pay the bonus the employer changed the *status quo* without the consent of the union, and as is noted above, forced the union to alter its position in bargaining. For all of the above reasons the Board finds the Clinic breached the provisions of section 86 of the Act. The Clinic is directed to implement the payment of the Christmas bonus, retroactive to 1995. The Board will remain seized of this matter to deal with any issues which may arise out of the implementation of this direction.

Board File No. 2359-96-U, Section 96 Application filed by the Union on November 7, 1996

42. The union's second unfair labour practice complaint makes a number of allegations. As the allegations are somewhat unrelated, each is dealt with separately below.

(a) February 6, 1996 letter

43. The union alleges that the employer wrote an inappropriate letter, dated February 6, 1996, which was handed to all bargaining unit members, prior to the fifth negotiation meeting between the parties which was to be held on February 13, 1996. According to the union, the letter, from all of the partners of the Clinic, was designed to be a veiled threat to the job security of the employees in the bargaining unit and was intended to undermine the bargaining authority of the union. It was to make employees fearful of remaining unionized by highlighting the rising costs to the Clinic, one of which was having to deal with the union. The union is claiming breaches of sections 5, 70, 72, and 76 of the Act, and suggests that the Board should consider the letter in the context of the other allegations made regarding the comments of Karen Menei and Dr. Jean Maskey.

44. The employer responds that it had sent a draft of the letter to the union prior to giving it to the employees, but did not hear any objection from the union. It claims the letter was sent as a response to rumours that the Clinic believed were circulating in the workplace about the closure of the Clinic, and as a means of providing the employees with information about the financial circumstances of the Clinic. In any event, the employer claims it was not linking the departure of physicians to the union certification, and the letter was not a warning to employees about the Clinic's future. The employer argues that the letter was within the bounds of its free speech rights, and does not violate any sections of the Act.

45. The letter is on Fort William Clinic letterhead and is signed by 12 partners of the Clinic. For ease of reference, and because the content of the letter is the matter of controversy, the text of the February 6, 1996 letter is reproduced below:

We have been approached by a number of staff members to inform our employees of recent events that are occurring at the Fort William Clinic. We hope by sharing information on the impact that these events will have on the Fort William Clinic, that our employees will understand the present situation and by way of responding to the rumours that are going around. We would like to share the following information with you:

- i) Dr. J.L. Toppin - resigned from partnership effective August 31st, 1995.
- ii) Dr. G.H. Morrison - retired effective August 31, 1995.
- iii) Dr. J.B. Marchuk - has resigned from the partnership and will be moving from the City effective February 15th, 1996.
- iv) Dr. E.K. Marchuk - has resigned from the partnership effective March 31st, 1996.
- v) Dr. P. Morbey - has resigned and will be leaving for the USA upon receipt of his "American Green Card" - estimated March, 1996.

To date, our four associate physicians have declined invitations to become partners in the Fort William Clinic.

The average cost for a physician to carry on a medical practice at the Fort William Clinic is approximately \$85,000 each. The loss of five physicians will result in a \$425,000 decrease in contribution to overhead for the future.

Aside from this economic loss, other costs or loss of income are also being experienced. It is anticipated that the cost of reaching a collective agreement with S.E.I.U. may reach \$50,000. The government has arbitrarily withdrawn a refund of a portion of the medical malpractice insurance physicians must carry. This action could cost the clinic a further \$50,000.

In total, it is expected that the remaining partners at the Fort William Clinic will have to absorb approximately \$525,000 in added expenses or loss of contribution toward overhead this year.

This cost will mean a significant increase in the cost of doing business at the Fort William Clinic for the remaining partners.

The result of this increase in costs to physicians practising at the Fort William Clinic has put the clinic at a competitive disadvantage in recruiting new physicians.

The Fort William Clinic can only survive by having new partners join the Fort William Clinic as others retire. Because our cost of doing business has risen significantly above the costs of "competing clinics", we will have more difficulty recruiting new doctors. The consequences of this difficulty in recruiting should be clear.

The partnership has an active recruiting program going on. As well, the partnership is looking at *all* aspects of our business that can reduce costs. This must be done to salvage our clinic.

Because of the economic condition of the province of Ontario, physicians live in a climate of global and personal caps on our production. Therefore, we are unable to meaningfully increase our financial return.

The income of the clinic is largely controlled by the government and for the past 3 years, we have lived through "clawbacks" of OHIP fees of 2.8% April 1993-March 1994, 7.5% April 1994-March 1995, and estimated 10% April 1995-March 1996. It appears that there will be ongoing "clawbacks" for the near future.

With the new powers given to the Minister of Health with passage of the "Omnibus" Bill, plus the unknown costs of hospital amalgamation/rationalization of services and further bed closures in our hospital system, the financial future is uncertain at best.

We hope that the information we have shared with you above will result in a better understanding of the present situation at the Fort William Clinic. The physicians and management welcome your questions and suggestions.

46. The Clinic sent a draft of the letter to Richard Armstrong, the chief negotiator for the union. However, he was not available when it arrived, and consequently never saw it before the employer distributed it to the employees. The matter was subsequently discussed between the parties at the bargaining table on February 13, 1996, after the letter had been given to all employees. The union objected strenuously to the content of the letter.

47. There is no actual evidence before the Board that any bargaining unit members had approached the employer asking questions about the status of the Clinic. Notwithstanding that, the partners' letter is clearly framed as a sharing of information with employees about the Clinic's current situation. According to Mr. Johnson, the letter was drafted by the physicians and he checked the figures for inclusion in it. He suggested that as long as he has been at the Clinic he, as Executive Director, or the Chair of the Executive Committee of the partnership, have sent staff memos about policies or

recruitment. Departmental meetings are also held with staff to communicate with them. Minutes of staff meetings are posted in the lunch room as another means of communication. There is no evidence that this particular communication style, a letter signed by the individual partners, had ever been utilized before as a mode of communication.

48. Since the number of physicians working out of the Clinic determines how many other staff are required, particularly as each doctor has a Doctor's Assistant, employees are keenly interested in which doctors are coming or going, and in the state of recruitment of new physicians. The letter explained who was leaving, and why, and explained that the Clinic was actively recruiting.

49. Mr. Johnson testified that the Clinic was looking to the employees to give it ideas to stay competitive, and was trying to impart to the employees that the Clinic *had* to make changes to stay competitive. While he admitted that all of the Thunder Bay clinics were having trouble recruiting and keeping physicians at the time the letter was written, he conceded that reality was not reflected in the letter to the Clinic staff. Mr. Johnson testified that one of the concerns which had been expressed by the staff prior to the letter being written was that the Clinic may close. He conceded that someone reading the letter may get the impression that there was a spectre of the Clinic not surviving. While no employee had asked about the cost of negotiating a collective agreement, the Clinic felt it wanted to tell the employees about this expenditure item.

* * *

(b) Fred Bickford's Comments at the February 13, 1996 Negotiating Meeting

50. The union alleges that the Clinic counsel and chief negotiator, Fred Bickford, made a comment at the February 13, 1996 negotiating meeting to the effect that the Clinic relationship with the union was not necessarily a "long term relationship".

51. The Clinic argues that the comment was one made in the context of negotiations, was part of a larger discussion, and asks that no adverse inference be drawn from the comment.

52. While I am not unmindful of the negative effect this comment had on the union negotiating committee, the Board is satisfied that there is nothing to be made of Mr. Bickford's comment in the context of negotiations. The negotiations between these parties were fractious and sometimes heated, and I am of the view that no purpose is served by taking this comment out of context.

(c) Karen Menei's Comments to Sheila Murray in April or May, 1996

53. The union alleges that in April or May, 1996, Karen Menei, a supervisor at the Clinic, told a bargaining unit member, Sheila Murray, that if the employees did not decertify the union, they would all lose their jobs. The Clinic denies this allegation, argues that neither woman recalls exactly what was said, and states that in any event, this was a personal conversation between them, where Ms. Menei was not acting in a supervisory capacity to Ms. Murray.

54. Karen Menei is the supervisor of Medical Dicta Typists, and when the Executive Director, Assistant Executive Director, and the Switchboard Supervisor (who only works mornings) are away from the Clinic, she is the Acting Manager in charge of the Clinic. Ms. Murray deals with confidential partnership matters and completes Revenue Canada documentation regarding the doctors' incomes. She is excluded from the bargaining unit. Sheila Murray is a Medical Records Clerk, not generally supervised by Ms. Menei, except in the exceptional circumstance of Ms. Menei being the Acting Manager in charge of the whole Clinic, which apparently happens about once a year.

55. In April or May, 1996 Ms. Murray was in Ms. Menei's work area looking for a file when Ms. Menei approached her and had a very short discussion of about one or two minutes duration. Ms. Menei testified that she discussed the fact that doctors were leaving the Clinic, staff were being laid off, the pro's and con's of the union, and that she was concerned about the future of her own and the other employees' jobs. She believed the Clinic would close if a first contract was negotiated. This was the only time Ms. Menei ever discussed the union with Ms. Murray. Ms. Menei conceded her memory had faded, and it was apparent she had a very sketchy recollection of the discussion.

56. Ms. Murray's evidence is that Ms. Menei told her that if the union got a contract for the Clinic the doctors would never allow that and the Clinic would close. It was Ms. Murray's view that Ms. Menei was expressing her fears and was speaking to Ms. Murray out of friendship. Ms. Murray did not add to the conversation, but just indicated she was listening. Ms. Murray and Ms. Menei are casual friends at the Clinic and sometimes take their coffee breaks together sometimes. Ms. Murray was taken aback by Ms. Menei's comments as the two had never discussed the union before. It is noteworthy that the conversation took place in the aftermath of the February 6th letter, and after some staff had been laid off in February and March, 1996, after the release of the letter. Both Ms. Menei's and Ms. Murray's departments had been affected by the layoffs.

57. Both women were honest and straightforward in giving their testimony, and both admitted the limitations of their respective memories. In my view their versions are not so dissimilar that it is necessary to make a finding on the credibility of either witness. However, it seems more likely than not that no "pro's" about the union were discussed in this very short conversation, and that Ms. Menei was expressing a concern that everyone may lose their jobs if the union was successful in getting a first collective agreement.

58. After the conversation had taken place Ms. Murray told Glen Chochla, counsel for the union, about it, in May or June, 1996, after a union meeting. She told him in the presence of about a dozen of the union members who were still present after the meeting. Ms. Murray regularly attends union meetings, and has only missed two or three meetings since the certification. At these meetings the issue of the Clinic closure has come up frequently as members raise their fears that they may lose their jobs, especially after there began to be layoffs of staff due to the departure of doctors from the Clinic, and the problems the Clinic appeared to be having in recruiting new doctors.

(d) Dr. Jean Maskey's Comments to Debbie Karpowich and Donna Insley

59. The union alleges that in late August or early September, 1996, Dr. Jean Maskey, one of the partners of the Clinic, told Debbie Karpowich, a Doctor's Assistant, that Dr. Maskey had contacted a number of graduating doctors to recruit them to the Clinic, but that none would come to it because it was unionized. On October 17, 1996, when Dr. Maskey was leaving the Clinic to move to British Columbia, she told another Doctor's Assistant, Donna Insley, that the employees had to get rid of the union or the Clinic would close. She warned Ms. Insley that the doctors would always have a job, but that the employees would not be able to get jobs so easily. Dr. Maskey went on to tell Ms. Insley that the partners believed Ms. Insley was one of the union organizers. The union complains that Dr. Maskey's comments were designed to encourage employees to decertify the union, threatened closure of the Clinic, and were intended to threaten, intimidate and coerce employees from their support for the union.

60. The Clinic argues that Dr. Maskey's conversation with Ms. Karpowich was in the context of a doctor/patient relationship, not as an employer to an employee, and was not intended to threaten, intimidate or coerce her. Since Dr. Maskey resigned from the partnership on October 11, 1996, the Clinic argues she was no longer speaking for the Clinic when she had her conversation with Ms. Insley. Dr. Maskey and Ms. Insley were personal friends, and it is alleged that it was in that context that the

conversation took place. The Clinic argues that Dr. Maskey's comments cannot be found to have been breaches of the Act.

61. Dr. Maskey did not attend at the hearing, so that the Board did not have the benefit of her evidence. The Board did hear from Ms. Karpowich and Ms. Insley, both of whom were completely credible witnesses.

62. Ms. Karpowich has worked at the Clinic for 16 years, is a union steward and is on the union's negotiating committee. Dr. Maskey was a partner at the Clinic, and as such can be taken to have known of Ms. Karpowich's union positions. Ms. Karpowich was aware that Dr. Maskey was leaving the Clinic to go to British Columbia. In the last week of August and the first week of September 1996 Ms. Karpowich was filling in as Dr. Maskey's Doctor's Assistant. During the course of the work day in early September, in their work module, Ms. Karpowich asked Dr. Maskey if she had found a replacement to take over her practice. The uncontroverted evidence is that Dr. Maskey said she had sent out letters to all of the doctors graduating that year, and in any of the responses she had received, once the fact of the Clinic being unionized came up, no one was interested in coming. Ms. Karpowich told Dr. Maskey that doctors work in unionized hospitals, but Dr. Maskey responded that that was a totally different situation because the Clinic is a privately run practice. Dr. Maskey, as a partner in the Clinic, had signed the February 6, 1996 letter to the employees.

63. Ms. Karpowich and her mother were both patients of Dr. Maskey. However, she was not asking Dr. Maskey about a replacement in relation to their doctor/patient relationship, but rather as an employee of the Clinic who had worked beside Dr. Maskey for 10 years. They also know each other as work friends, having worked in the same module for years. The modules are work areas where a cluster of doctors and their assistants work side by side. Ms. Karpowich normally worked for another physician in the same module as Dr. Maskey.

64. Ms. Karpowich testified that she has attended every union meeting, and that they are usually held about every three months to bring employees up to date on what is happening. Attendance at the meetings is good. The issue of the Clinic closing is a main issue discussed frequently at the union meetings because it is believed that the Clinic does not want to be unionized, and that has contributed to the length of negotiations. Union members therefore ask how much the negotiations must be costing the Clinic, and how long they will continue. They also talk about the number of physicians leaving the Clinic, and that it seems difficult to replace them. Ms. Karpowich recounted that Ms. Murray's conversation with Ms. Menei, and Ms. Insley's conversation with Dr. Maskey, had both been the topics of discussion at union meetings. She has noted that the concerns about closure of the Clinic had increased in intensity by the date of the filing of the first contract application in November, 1996.

65. Ms. Insley has worked at the Clinic for 15 years, and had worked as Dr. Maskey's assistant for 12 years before Dr. Maskey left. She now works for Dr. Maskey's replacement, Dr. Chung. Dr. Maskey left the partnership and the Clinic officially on October 11, 1996. On October 17th she returned to clean out her office the day before she left Thunder Bay. At around 11 a.m., during Ms. Insley's working hours, she and Ms. Insley had a conversation in Dr. Maskey's office. Dr. Maskey told Ms. Insley that, for the record, she was no longer a partner. She then proceeded to tell Ms. Insley that Ms. Insley should get the union out or else the Clinic would close. Dr. Maskey told her that the doctors would always have a job, but the employees would not, and that Ms. Insley's job was hanging on by a string because Dr. Chung was coming. Dr. Maskey told Ms. Insley that she was concerned about Ms. Insley, and that the partners had thought for a while that Ms. Insley was one of the union organizers. Ms. Insley informed Dr. Maskey she was not one of the union organizers and that the partners were looking at the wrong people. Dr. Maskey told Ms. Insley that the two Doctors Marchuk had put their resignations on the table the day the union came in, and that the union was one of the reasons that Dr.

Nielipovitz left around the end of August, 1996. Also, she had just heard that another partner was leaving the Clinic, and Dr. Maskey said that if one more partner left, the doctors could no longer operate the Clinic as a business. Ms. Insley thanked Dr. Maskey for her candour and concern, but said she could not change the situation. Thereafter the two women said an emotional goodbye.

66. Ms. Insley took to heart what Dr. Maskey had said as she believed Dr. Maskey was concerned for her well-being, and had not had to say anything. Dr. Maskey had been a close friend, as well as being Ms. Insley's boss, and the two women socialized outside of the Clinic. They had never had a discussion about the union before.

67. Ms. Insley told her friend and co-worker, Ms. Karpowich, about the conversation as she knew Ms. Karpowich was a union steward and on the union negotiating committee. Ms. Insley thought Ms. Karpowich should raise this at a union meeting, and it was raised at the October union meeting. Ms. Karpowich told the meeting what Dr. Maskey had told Ms. Insley, and Ms. Insley confirmed what had been relayed. Fifteen people were present at that union meeting.

68. Like Ms. Karpowich, Ms. Insley has attended all of the union meetings and testified that the possibility of Clinic closure has come up at almost every meeting in the last year. Her evidence with respect to what was discussed at the meetings was similar to that given by Ms. Karpowich, and I do not therefore intend to repeat it.

* * *

69. As the union has alleged breaches of sections 5, 70, 72 and 76 of the *Labour Relations Act, 1995* in this application, for ease of future reference, all of these sections are reproduced here:

5. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.

70. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

72. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to

cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

76. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

70. In *A.N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393, the Board outlined its view about employer communications with employees during the course of bargaining as follows:

18. The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section [70] of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not "deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence". Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section [70]. Once outside this protected area, such communications can be characterized as a violation of section [96] of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent.

71. In reviewing the employer communications with employees the Board examines not only the nature of the particular communication, but also the timing and particular bargaining context in which those communications occurred (see *The Citizen*, [1979] OLRB Rep. March 177, at para. 57). Thus, in a mature bargaining relationship, employer communications during the course of collective bargaining will be viewed differently than in a new bargaining relationship, or in the context of an organizing drive. In the latter two circumstances the Board is concerned that "employees are likely to be particularly sensitive to any utterances by management" because the Board has generally accepted that "undue influence" is defined as the "unconscientious use by one person of power possessed by him over another to induce the other to enter into a contract" (see *American Can Canada Inc.*, [1983] OLRB Rep. Oct. 1609, at para. 12).

72. I am in agreement with the following excerpt from *Canadian Labour Law* (Second Edition, June 1996, p. 10-54) wherein the Honourable Mr. Justice George W. Adams (as he then was) states the following:

The juxtaposition of words used in an employer's communication with employees, not only each in relation to the others but also as an aggregate, may bear special purport in the setting in which they are used. This analytic approach was recognized early by Mr. Justice Learned Hand in *N.L.R.B. v. Federbush Co., Inc.*, cited with approval in *Greb Industries Ltd.* [1979] 2 Can. L.R.B.R. 56 (Ont.) at p. 62]:

Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and *pro tanto* the privilege of free speech protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion ... What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination

which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.

* * *

73. In reviewing the evidence with respect to the letter it appears that, for the most part, the letter is simply informative about physician partner departures, the impact of those departures on the cost of overheads for the remaining partners, and how government clawbacks of OHIP fees have affected the Clinic's income. What is troublesome is that *the first* specific reference to an increased cost to the Clinic is the anticipated cost of reaching a collective agreement with the union, which the partners believed at that time may reach \$50,000. After listing one other cost, the partners indicated that the result of the increases in costs to physicians had put the clinic at a "competitive disadvantage in recruiting new physicians". They then proceeded to outline the consequences of the difficulty in recruiting, and said the partnership was looking at "*all* aspects of our business that can reduce costs" as this "must be done to salvage our clinic". The partners indicated that the income of the clinic was largely controlled by the government, which had imposed clawbacks in the last three years, the inference being that it was unlikely that income could be increased to offset the increased expenses. The last substantive phrase in the letter is that "the financial future is uncertain at best".

74. Given Mr. Johnson's evidence that this letter was supposed to be a response to employee concerns about the closure of the Clinic, it would not appear to be a very sanguine letter. The emphasis in the letter is on recruiting - but it is clear that the partners are stressing that costs *must* be reduced if recruitment is to be successful, and costs *must* be reduced to "salvage" the Clinic. To the average employee the only cost she would have been able to identify as one she may have any control over would be the one associated with having a union.

75. In a case where this letter was an isolated communication from an employer to its employees, it would be unlikely to have been viewed by the Board as a problematic communication. While the Board is very careful to try to protect an employer's right to express itself, in the context of this ongoing first contract negotiation, where the employer had already laid off employees and had cancelled a Christmas bonus, and where there had been limited obvious progress in the collective agreement negotiations (as will become clear later), this letter becomes more suspect. When the letter is reviewed along with all of the verbal communications which followed, the comments made by Ms. Menei and the pointed comments made by Dr. Maskey, along with the lack of progress in collective bargaining, a course of conduct emerges which suggests a veiled threat, is coercive, and unduly influential with employees. In the context of all of the findings in this unfair labour practice complaint, the Board further finds that the letter was designed to undermine the bargaining authority of the union at this early stage in the negotiations.

76. Having reviewed the evidence and the submissions with respect to the Karen Menei/Sheila Murray incident, the Board is satisfied that Ms. Menei, while a supervisor, was not speaking for the Clinic when she made her comments to Ms. Murray. She was expressing her concern about the Clinic closing to her work friend. There is no evidence to suggest that Ms. Murray took the comments as a threat, but it is clear that Ms. Murray was concerned enough about the discussion to inform the union about it. That is not surprising given that the issue of the Clinic closure had been raised at union meetings by bargaining unit members, so Ms. Murray would want to convey to the union that management staff were also expressing similar fears. While the Board finds no breach of the Act arising out of this incident, this conversation does contribute to an understanding of the fears of closure, linked to the presence of the union, which were being fanned in the workplace by management personnel.

77. It is troublesome that Dr. Maskey made the comment she did to Ms. Karpowich, a union representative in the workplace, because it seems clear that the comment was intended to bolster the

already rampant fears about Clinic closure due to the problems with doctors leaving and the Clinic's apparent inability to recruit new doctors. This was the first time the partnership had actually tied the presence of the union to the Clinic's inability to recruit. Dr. Maskey had to have known, or could reasonably have expected, that Ms. Karpowich would tell the union and/or her fellow workers about the comment. Ms. Karpowich did tell her co-worker, Donna Insley, about it. Having reviewed the evidence with respect to the Maskey/Karpowich incident, the Board cannot find that the comment made by Dr. Maskey is, on its own, a breach of the Act. However, as will become evident below, the comment is significant to how the employer was building an atmosphere of fear for job security in the workplace.

78. In *Keith MacLeod Sutherland*, [1983] OLRB Rep. July 1219, the Board quoted with approval from an older case, *Saverio A. Greco*, [1976] OLRB Rep. June 323, wherein that panel of the Board had said:

32. It is clear from a reading of section [76] that a violation of that section occurs the moment a person 'seeks' to compel another to do one of the acts set out in the section. It is therefore unnecessary for a complainant to prove that he has in fact been intimidated or coerced in doing or refraining from doing anything. The offence is complete once an attempt to compel by intimidation or coercion has been made.

79. Section 76 refers to any "person" and does not require that the person be acting for an employer or employer's organization. Notwithstanding that on October 17th Dr. Maskey was no longer a partner, she had, until one week earlier, been one. She had in February, 1996 signed a letter to the employees which said that the Clinic had to reduce costs, that the union collective bargaining was one of the major costs to the Clinic, that doctors were leaving the Clinic, that the Clinic needed to be "salvaged", and which solicited employee suggestions. In September, 1996 Dr. Maskey told the union steward and member of the negotiating committee that no doctor would come to the Clinic because of the union. It is not a stretch to say that when Dr. Maskey spoke to Ms. Insley on October 17, 1996, she was conveying a message about what the partners felt about the presence of the union in the Clinic. She specifically told Ms. Insley that Ms. Insley's job was hanging on by a thread, and that the partners believed Ms. Insley was a union organizer. She asked Ms. Insley to get the union out or the Clinic would close. The Board is satisfied that Dr. Maskey was seeking by intimidation or coercion to compel Ms. Insley to cease to be a member of the union, and indeed, was advocating a termination application, which in fact did eventually emerge.

80. In reaching this conclusion I have considered the friendship relationship between Dr. Maskey and Ms. Insley. However, that does not change the fact that Dr. Maskey was Ms. Insley's "boss" and a partner in the Clinic. Just because she had left the partnership one week before did not give her license to now say to a bargaining unit member what she had been legally unable to before. If it was possible for an employer to disclaim responsibility for what was said by persons who had been so recently associated with its management, it would leave open the possibility of concocting situations to allow for prohibited speech. In any event, what Dr. Maskey said to Ms. Insley, her friend, was consistent with what the partners and she herself had been suggesting in a roundabout way since February. Furthermore, neither Mr. Johnson, nor any Clinic partner testified before me that any of Dr. Maskey's comments were untrue. The Clinic adduced no evidence which would have distanced the Clinic from Dr. Maskey's comments, except that it suggested that Dr. Maskey was not speaking for the Clinic on October 17, 1996. As noted earlier, in the context of this case I am satisfied that an inference can be drawn from all of the evidence before me that Dr. Maskey was passing on to Ms. Insley the views of the Clinic partnership.

81. For all of the above reasons, the Board finds that the Clinic has violated sections 70, 72 and 76 of the Act.

* * *

82. Having found the violations of the Act outlined above, the Board accordingly directs:

- a) that the Clinic forthwith, and for a period of 60 days from the date of this decision, post the Notice appearing as an Appendix to this decision; the Notice is to be posted where it will come to the attention of all employees in the bargaining unit; and,
- b) that the Clinic, at its own expense, and as soon as possible after receipt of this decision, provide a copy of this decision to every employee in the bargaining unit.

Board File No. 2360-96-FC, Application for Direction that a First Collective Agreement be Settled by Arbitration

83. On November 7, 1996 the union filed with the Board an application seeking a direction that a first collective agreement be settled by arbitration. A “no-board” report had been issued on November 5, 1996, and had been released on November 7, 1996. The union asked that the two section 96 complaints dealt with above be heard with the first contract case as the union is seeking to rely on the factual bases of those applications in the first contract application. The vast majority of the 21 days of hearing in these matters was devoted to this particular application, so much so that the parties took a day each just to make their final submissions on the first contract portion of the case. Given the length of those submissions, I do not intend to reproduce them in full at this point, but rather will give a brief summary of the fundamental positions of the parties. I will then address specific areas of contention and the Board’s findings and decisions under sub-headings.

84. The union position in seeking this declaration is that the process of collective bargaining has been unsuccessful because the Clinic has, through its bargaining proposals, refused to recognize the bargaining authority of the union, has taken uncompromising positions at the bargaining table without reasonable justification, and has failed to make reasonable or expeditious efforts to conclude a collective agreement. The union alleges that the Clinic did not want a union at all, and had no intention of concluding a reasonable collective agreement. The gist of the union’s position is that 17 months after certification, and after 13 negotiating sessions, the parties only had 50 non-contentious articles agreed to. Eighty five articles were still outstanding, and all of the difficult issues were still on the table. The union contends that for negotiations to be seen to be progressing the parties must be able to see a light at the end of the tunnel, and that was not the case in its negotiations with the Clinic.

85. The Clinic argues that the process of collective bargaining had not been unsuccessful, and states that the union has not met its onus of proving that threshold question. In any event, the employer argues it did recognize the bargaining authority of the union, it had not reached impasse on issues and was still making movements on articles, it did have reasonable justification for its positions, and it made reasonable efforts to conclude a collective agreement.

86. The relevant provisions of section 43 of the Act are reproduced here for ease of reference:

43. (1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within 30 days of receiving the application and it shall direct the settlement of a first collective agreement

by arbitration where, irrespective of whether section 17 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

87. There is no dispute between the parties that they had been unable to effect a first collective agreement at the time the union made this application to the Board. It is also undisputed that the Minister had released a notice that she did not consider it advisable to appoint a conciliation board (a “no board” report). The requirements of section 43(1) have been met in the circumstances of this case.

88. The question is whether it *appears* to the Board that the process of collective bargaining has been unsuccessful because of the Clinic’s refusal to recognize the bargaining authority of the union, or, due to the uncompromising nature of *any* bargaining position adopted by the Clinic without reasonable justification, or, because of the failure of the Clinic to make reasonable or expeditious efforts to conclude a collective agreement. The union has specifically asked the Board to also consider the impact of the Clinic’s behaviour complained of in the two unfair labour practice complaints filed and dealt with in the course of this hearing.

89. The Board has long recognized that section 43 is a remedial provision designed to ameliorate situations in which difficulties in reaching a first collective agreement have been encountered by the unjustified intransigence of one of the parties. However, this provision in the Act is not intended to supplant the primacy of collective bargaining (see *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005). The Board has also stated that in considering such applications it should consider the entirety of the collective bargaining process and that the conduct of both parties is relevant to that consideration (see *Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441). In *Teledyne* the Board considered whether the “process of collective bargaining has been unsuccessful”. While the Board found that there is no minimum number of bargaining sessions that the parties should have participated in, that is one consideration. It will also consider whether the parties have made substantial progress in reaching agreements and whether the bargaining process has been allowed to take its course with the parties having attempted to bargain all or most outstanding matters. In *Peacock Lumber Limited*, [1990] OLRB Rep. May 584, the Board noted that a party is not required to continue bargaining if it is evident that bargaining has come to a halt and that further negotiations would be fruitless. In *MacMillan Bloedel Building Materials Limited*, [1990] OLRB Rep. Jan. 58, the Board considered the lack of any meaningful progress, and that there was no reasonable likelihood that the parties would compromise on the central issue in the dispute, in finding that the process of collective bargaining had been unsuccessful. The Board, in *Metro Taxi Ltd. c.o.b. as Capital Taxi*, (Unreported, Board File No. 3081-95-FC, September 9, 1996), stated that whether section 43(2) applies is a question of fact which the Board is to determine by looking at the totality of the parties’ conduct during bargaining.

90. The Clinic and union had held 13 bargaining sessions over the course of one year by the time the union applied for first contract arbitration. As was their pattern, they had provided each other with comprehensive reviews of their respective positions on most aspects of their proposals on a number of occasions. While the employer did not respond on any monetary issues until September, 1996, it had the union’s monetary proposals on everything except wages from the start of negotiations.

On October 29, 1996 the Clinic gave the union its wage proposal and it was discussed. The union's wage proposal is the only aspect of the proposed collective agreement not discussed at a meeting of the parties as the union tendered its wage proposal on November 1, 1996, after the last date on which the parties negotiated.

91. As outlined earlier, the progress made by the parties in the one year of negotiations was agreement on 50 items, with 85 items still outstanding, most of which were substantive provisions (as will become clear later). The Board is satisfied that the bargaining process in this case had been allowed to take its course but that substantial progress had not been made. The parties had addressed themselves to all areas of a potential collective agreement, and had attempted to bargain almost everything that the employer was prepared to negotiate about. While it is true that there was limited discussion on the employer's wage proposal, and none on the union's wage proposal, in the circumstances of this case it is sufficient that the union had had an opportunity to canvass the employer's wage proposal. This is of some importance because had the employer been unwilling to give the union anything in collective agreement language, but had made a generous offer of wages, the union, having been apprised of the employer's proposal, would have had the opportunity to consider whether it wanted to trade wages for language. As it was, the employer was looking for concessions for existing employees in its wage proposal, and a lower rate for all new employees, so that the union knew by October 30, 1996 what money and language was on the table.

92. The Board is of the view that by September, 1996 there was little meaningful progress being made in the negotiations. I am bolstered in that view by the fact that the employer itself thought so and therefore finally introduced its proposals on the monetary issues to see if those would get the negotiations moving on the non-monetary items. Having reviewed the employer's position on the issues of union dues and union security on the last day of negotiations, it is patently clear that the parties were not likely to compromise on what was one of the central issues for the union. On all of the evidence, and in light of the considerations outlined above, the Board is of the view that the process of collective bargaining had been unsuccessful. I now turn to consider whether the employer engaged in conduct which falls within the subsections of section 43(2).

93. The parties' last bargaining session before the union filed its first contract application was on October 30, 1996. As has been noted earlier, the first contract application was filed on November 7, 1996, and at the time of filing the application, of the 135 provisions of the proposed collective agreement, 85 remained outstanding. It is the union's contention that many of the items which remained outstanding were fundamental issues to any collective agreement, and that the parties had made little or no progress on them in the 12 months of bargaining. Given the importance the union has attached to many of the outstanding provisions, the Board will go through some of them to track the progress the parties had made and to provide some indication of the type and number of outstanding issues.

94. **Union Security:** The union position was that as a condition of employment, all newly-hired employees must become members of the union after passing their probationary period, and must remain members while employed at the Clinic. Current employees are to become union members, or may exercise their option under the *Labour Relations Act, 1995*.

95. The employer agreed essentially with the provision as it related to new employees. However, current employees are to have the option of becoming union members, or can have the Clinic remit the equivalent of their union dues to a charitable organization, without having to come to the Labour Relations Board to establish a religious exemption. The justification the employer offered was that this provision would protect the current employees' freedom to not join the union without having to spend any time and money on going to the Board.

96. **Union Dues:** The union wanted union dues deducted for anyone in the bargaining unit. The employer wanted employees, prior to ratification of the first collective agreement, to be able to choose to pay union dues, or to direct the amount of union dues to the charity of their choice, as is allowed by the Act. The employer did not contemplate employees actually having to establish a religious exemption before the Board.

97. The union characterizes the employer's position on these two articles as a failure to recognize the role of the union in the workplace, and sees the Clinic ignoring that the union is now the bargaining agent for the employees. The union tried to bargain these provisions on the last day of negotiations, in the hopes that the employer would get this fundamental issue off the table, but the employer would not agree.

98. Sections 47, 51(1)(a), and 52 of the Act are relevant to these issues and state:

47. (1) Except in the construction industry and subject to section 52, where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union, forthwith.

(2) In subsection (1),

"regular union dues" means,

- (a) in the case of an employee who is a member of the trade union, the dues uniformly and regularly paid by a member of the trade union in accordance with the constitution and by-laws of the trade union, and
- (b) in the case of an employee who is not a member of the trade union, the dues referred to in clause (a), excluding any amount in respect of pension, superannuation, sickness insurance or any other benefit available only to members of the trade union.

51. (1) Despite anything in this Act, but subject to subsection (4), the parties to a collective agreement may include in it provisions,

- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;

52. (1) Where the Board is satisfied that an employee because of his or her religious conviction or belief,

- (a) objects to joining a trade union; or
- (b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause 51 (1) (a) do not apply to the employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree

then to a charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) that may be designated by the Board.

(2) Subsection (1) applies to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection (1) is first entered into with that employer and only during the life of such collective agreement, and does not apply to employees whose employment commences after the entering into of the collective agreement.

99. The Clinic justification for its position on the union security and union dues provisions was that it did not want to remove the freedom of choice from its employees regarding their decision to join or not join the union. The fact is, however, that the employees of the Clinic have a trade union representing them because a majority of them wanted the union. The Act contains protections for employees who may have religious convictions or beliefs which prevent them from joining a trade union or paying union dues. Therefore, the Board is drawn to the conclusion that the employer was simply refusing to recognize the bargaining authority of the union on issues which go to the heart of the security of the bargaining agent, to the integrity of the bargaining unit and which have been recognized as such in the provisions of the *Labour Relations Act, 1995*. (See also *Romatt Custom Woodwork Inc.*, [1992] OLRB Rep. March 377).

100. **Discharge Grievance Procedure:** The employer wanted a clause that discipline or discharge on specified grounds would be deemed an appropriate specific penalty, and that the only issue which could be arbitrated was whether the breach of the specified grounds had actually occurred. There were 11 specified grounds listed including in addition to the more usual items, discourteous or rude behaviour to patients, insolence, breach of the Clinic's multi-page dress code and grooming rules, and, *any* breach of the personnel policies. In its management rights clause the employer also wanted a clause permitting it to continue in force any pre-existing Clinic policies, unless inconsistent with the express provisions of the collective agreement. The union was therefore concerned about the wide breadth of the employer's power to discharge with this specific penalty clause.

101. The union proposal on October 30, 1996 was to permit the employer to have the eleven grounds included in the collective agreement, so long as employees had the right to grieve and without a specific penalty which was not subject to an arbitrator's power to review and alter the penalty. The union had asked during negotiations about the draconian nature of the employer policies on grooming and dress code, and had been told they were non-negotiable items and that the employees needed to know what would be acceptable behaviour and what was not. Mr. Johnson has himself noted in his April 30, 1996 notes that the grooming and dress codes are not negotiable. During cross-examination Mr. Johnson admitted the Clinic did not want to have to take an employee back as a result of an arbitration. He also suggested the issue of the dress code was only not negotiable at that time, suggesting it was still open for negotiation at some time. However, the Board is satisfied that was not the case, and certainly by October 30, 1996 the employer had shown no inclination to negotiate on this issue even though it had been discussed from at least February to October, 1996.

102. **Layoff, Recall, and Job Postings:** In cases of transfers, promotions, demotions, hiring, layoff or recall situations, the employer wanted to be able to consider such criteria as integrity and established working relationships with a particular physician, or his/her patients, in addition to the usual qualifications. The employer also wanted to be the sole judge of these qualifications, and its decisions were not to be arbitrable except that the employer was not to exercise its discretion in an arbitrary, discriminatory or capricious manner. The Clinic, by September, 1996, had toughened its position to add the integrity and established working relations requirements. The union was of the view that the language proposed, and from which the employer would not budge, would mean employees would essentially have no ability to challenge the employer's decisions. The employer was only willing to consider seniority after it had considered its list of qualifying factors, which in the union's view meant

the employer was not prepared to take it into account at all. No justification was provided for this position, and the employer would not explain how “integrity” would be measured. Mr. Bickford simply said during negotiations that in the world today there was no job security and that this workplace was not conducive to having job posting language. The Clinic apparently wanted to have complete control of these issues, and Mr. Bickford told the union that he who paid the bills should have the ultimate say. It was the union’s view that the employer wanted its relations to be with the employees, and not with the union.

103. In *The Boys’ Home*, [1992] OLRB Rep. 409, the Board found that a deemed termination provision, which is similar to the one the Clinic is seeking, gave the employer such a degree of discretion that it essentially eliminated any just cause protection, and removed the right to utilize the grievance and arbitration process for review of the penalty. The employer in that case was also seeking to conduct layoffs and job postings based on its sole judgment about a number of factors of a subjective nature, and giving consideration to seniority only after those subjective criteria had been determined by it. The Board in that case found that there was no justification for these positions and went on to state:

43. ... Limiting the scope of arbitral review seriously weakens or eliminates any protection afforded by a just cause clause. Both more standard grievance and arbitration collective agreement provisions and the protection provided by section [48] exist to provide employees with some protection against arbitrary decision-making on the part of an employer. The grievance and arbitration process is a fundamental benefit inherent in collective bargaining. That is evidenced by the mere fact that the Act mandates that there be included in every collective agreement a form of grievance and arbitration process to provide for the resolution of disputes by a neutral third party. While it is contemplated that parties can contract out of section [48] there was no justification provided by this employer for such an extensive limit on the arbitral power to review both employer decision-making and penalty. The mere assertion by the respondent that it is different by virtue of the fact that it is a social service agency providing care to young offenders provides no justification. There is nothing in the evidence that would warrant such a departure for this workplace.

104. The Clinic suggested it was both a different workplace where regular collective agreement provisions were not warranted, and it indicated it did not want to face the costs inherent in grievance administration and arbitration.

105. A consideration of whether an employer has taken uncompromising bargaining positions without reasonable justification requires the Board to assess the content of parties’ negotiating proposals with a view to making an objective determination as to their reasonableness (see *Bourque Consumer Electronics Service Inc.*, [1990] OLRB Rep. August 821). In *Formula Plastics Inc.*, [1987] OLRB Rep. May 702, the Board recognized that this is a difficult task in which the Board must draw heavily on its own expertise in labour relations. What the Board was clear about was that “reasonable” means more than a simple rational relationship between a bargaining position and a party’s self-interest. In making this determination, the Board has considered whether the employer is insisting on a “no improvements” collective agreement, or a “less than *status quo*” collective agreement, and whether the employer’s positions have been either rigid or so unreasonable as to be the cause of the breakdown of negotiations (see *Atway Transport Inc.*, [1991] OLRB Rep. April 425).

106. In *Bourque*, cited above, the Board considered the impact of the employer wanting economic concessions but refusing to provide the union with economic information to support its assertion that as a result of its financial situation, it needed the concessions. At paragraph 65 the Board stated:

More important, in our view, than the survey the company did provide in negotiations, is the information it failed and refused to provide. The company declined several union requests for economic data to support the company assertions. Considering the magnitude of economic concession sought, we view this failure as unreasonable on the company’s part. So long as the company refused to provide such information, the union’s scepticism regarding the company’s claim could hardly be expected to abate. In the circumstances of this case we find the company’s refusal to be

further failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement.

107. The Board in *Bourque* went on to find that the presentation of limited economic data at the hearing did not cure the earlier lack of information provided to the union during negotiations. At paragraph 69 the Board said:

... Section [43] requires the Board to assess the bargaining process; just as first contract arbitration ought not to be viewed as an automatic surrogate to collective bargaining, a respondent to a section [43] application ought not to assume that the hearing is an opportunity to cure its prior intransigence. Section [43] should create an incentive to the parties to bargain in the utmost good faith, it should not encourage either party to withhold vital information or otherwise save its "bottom line" position until such time as the matter is brought before the Board.

108. In the case before me, from a point prior to the beginning of negotiations, the employer claimed it had financial difficulties which were causing it to cancel the Christmas party and bonus. However, when the union asked for financial information to support this assertion, the employer did not provide any substantive information. Thereafter, during negotiations, the employer repeatedly relied on its claim of financial difficulties for the various positions it took. The union asked for financial support for the employer's positions, but received no substantive information. At the hearing of this application the employer produced a document which it has relied upon heavily to claim it had faced financial difficulties. However, even that document had no hard data, as it consisted of percentages and bar graphs based on figures not presented at the hearing. Since the Board does not have before it the background figures which have apparently given rise to the bar graphs and percentages, and is unaware of what the actual financial status of the Clinic is, it is unable to come to any conclusions about whether the Clinic is actually in serious financial difficulty. Hence, given the reliance of the Clinic on its financial position during bargaining, and the union's repeated requests for financial information which the employer did not provide, I find the employer's refusal to respond meaningfully to the union's requests to constitute a failure to make reasonable or expeditious efforts to conclude a collective agreement.

109. There is no evidence before me to suggest that the Clinic is different from any other organized Ontario workplace which has included arbitral review of employer decisions. As outlined above, the Board does not have sufficient evidence before it to establish that the Clinic had serious financial concerns. Like the Board in *The Boys' Home*, cited above, I am not satisfied that either of the employer's rationales is sufficiently cogent to warrant such a departure from what is one of the fundamental benefits of collective bargaining to employees, access to grievance arbitration for review of an employer's decision, and an opportunity for an arbitrator to assess whether the penalty imposed by the employer is warranted in all of the circumstances of each case. The Board finds the Clinic position regarding these issues to have been a refusal of the employer to recognize the bargaining authority of the trade union, and uncompromising positions which it adopted without reasonable justification.

110. **Hours of Work, Rest Periods and Meal Breaks:** The union, from the beginning of negotiations, asked for what the employees already had as rest periods and meal breaks in the existing Clinic policy. Thus it was seeking in the Hours of Work provisions to have a 7.4 hour work day with a 45 minute unpaid meal period, and two 20 minute rest breaks for the majority of the employees (the ultrasound and x-ray employees had a different work day). The employer proposal was that employees should work 7.5 hours per day, have a 30 minute unpaid meal period, and rest periods would be reduced to 10 minutes each. The employer was also unprepared to pay employees any more for the increased work day, and wanted the employees' present hourly rate to be re-calculated down to reflect this. This amounted to the employer seeking 130 minutes a week of extra work without pay for every employee in the bargaining unit. The employer justification for its proposal was that it made sense to have 7.5

hour days, that it made calculations easier, and that this was simply the economic reality because of the financial situation of the Clinic. The union committee was very upset with this employer proposal because the bargaining unit members of the committee felt the employer was penalizing them for having unionized.

111. **Wages and Benefits:** As noted above, the employer was seeking to have the prevailing hourly rate for bargaining unit employees reduced by seeking extra hours of work for no pay. When it tabled its wage proposal on October 29, 1996, it indicated it was seeking a two-tiered wage grid such that existing employees would be kept at their present (but reduced) rate, and new employees, who also had to join the union and pay union dues, would be paid at a lower rate. In addition, while existing employees would continue to have their benefits covered by the employer, the new employees would have to pay 50% of the cost of benefits. The union proposal for benefits was to maintain what the employees were already receiving. The union was seeking an increase in wages for all employees. The employer justification for its proposals in this area was that it was experiencing financial difficulties. It was unclear how the two tier system, which would only save the employer money if there were new employees hired, would benefit the employer in this regard, especially as the employer by all accounts was in a down-sizing mode. The union saw the employer's proposals as giving the employees a message that the union could not benefit them, and would in fact cost them more. It was therefore seen as an encouragement to employees to decertify the union, and a failure to recognize the bargaining authority of the union.

112. **Vacations:** The union proposal on vacations was to maintain the entitlements at what the employer had in its personnel policy. The only area in which the union was seeking an increase was for employees who had worked for the Clinic for over 35 years, so that such employees could get one extra vacation day per year of service. The employer position was to change the vacation year and to give vacation entitlements based on full months worked in the year previous, so that an employee who had been away from work sick for any length of time may have her vacation entitlement in the following year reduced. There is no evidence of employer justification for this position. The union argued that by reducing what employees had been receiving before certification, the employer was imposing a penalty on employees for having unionized.

113. With its first proposal for a collective agreement, the union had tabled its proposals on all the monetary issues, except for wages. It repeatedly asked the employer for its monetary proposals, with the exception of a wage proposal. The Clinic was of the view that the parties should deal with the non-monetary issues first, and this is apparently what the parties did with the acquiescence of the union. Unbeknownst to the union, it was also the employer strategy to only put on the table some monetary items when it believed no further progress was being made on the non-monetary items. Thus, in early September, 1996 the Clinic made its monetary proposal on all items except for wages, and on October 29 it made its wage proposal. The union argues that the employer had accepted by early September, 1996 that little or no progress was being made on the non-monetary articles.

114. In *Hillview Farms Limited*, [1990] OLRB Rep. May 564, the Board conducted a first contract arbitration in which the employer asked for a two-tiered pay structure. The Board found it inappropriate to award a two-tier wage structure which may appear to penalize employees hired after unionization. The Clinic had many proposals which were designed to create a two-tiered structure such that employees hired after certification and after the collective agreement had been reached would have to pay union dues, have to belong to the union, would have to pay 50% of the cost of their benefits package, and would be paid less than employees who had been at the Clinic prior to certification.

115. In addition to the two-tiered proposals, the employer was consistently seeking less than the prevailing *status quo* for employees in the bargaining unit. By its proposals regarding hours of work,

rest periods, meal breaks, wages and benefits, and vacations, the employer was signalling to the employees that they would not benefit from having unionized. As found earlier, the employer did not provide the union with any meaningful financial justification for the positions it was taking. Having regard to the Board's statements in *Bourque* and *Atway Transport*, cited above, the Board finds that the Clinic was taking uncompromising bargaining positions without reasonable justification.

116. **Probationary Period:** In its initial proposal the employer proposed a 3 calendar month probationary period for regular full-time staff, and 520 worked hours for regular part-time staff. By October 30, 1996 the Clinic was proposing that all new full-time employees would be probationary until they had worked 60 consecutive working days, and part-time employees must work 450 hours within any 6 month period to pass probation. The union viewed this as a hardening of the employer position and was concerned that in the future new part-time employees may never get past the probationary period as the employer was imposing a six month rolling time limitation. It was further concerned that since probationary employees have limited rights to grieve, the employer would be able to keep part-time employees on probation endlessly, and could thereby deprive them of access to substantive portions of the collective agreement.

117. The employer's position with respect to a probationary period for part-time workers provision may be viewed as another example of attempting to limit the scope of the collective agreement, and of limiting the number of employees who would have the protection of the collective agreement. As such, it may be seen as a refusal to recognize the bargaining authority of the union.

118. **Employees over the age of 65:** September 5, 1996, almost 11 months after the parties had begun bargaining, the employer proposed that employees who reached their 65th birthday be subject to mandatory retirement at the discretion of the Executive Director. Any employee who worked past 65 would no longer be covered by the provisions of the collective agreement. The union argues that the employer was essentially seeking to alter the recognition clause, which had long since been agreed to. The union was certified for an "all employee" unit, with exceptions, and the parties had agreed to a recognition clause reflecting the certificate. The union therefore contends that the employer was refusing to recognize the bargaining authority of the union by trying to bargain this proposal.

119. With respect to the Clinic's proposal to exclude from the protection of the collective agreement those employees over the age of 65, the Board has no hesitation in concluding that the Clinic was proposing to amend the recognition clause, and that such an issue cannot be pressed to impasse at negotiations. The union had been certified for an "all employee" unit, and the employer had already agreed that the recognition clause would reflect that. It is not sufficient justification to suggest that the *Human Rights Code* does not extend to the protection of those over the age of 65, so that the collective agreement did not have to either. The Board finds that the Clinic was, at a late stage in negotiations, still attempting to limit the parameters of the bargaining unit and was refusing to recognize the bargaining authority of the union.

120. **Arbitration Procedure:** From the start the employer position was that it wanted a panel of four arbitrators who would be used by the parties on a rotation system. By October 30, 1996 the union was prepared to consider this concept, but wanted to have some of its suggested names of arbitrators on the panel. The employer refused to add a single name from among the union's suggestions to the list of arbitrators, and provided no justification for this position. At one point earlier in the negotiations when Mr. Armstrong had told Mr. Bickford that he was not happy with the names of arbitrators on the list, Mr. Bickford threatened to call the arbitrators and tell them what Mr. Armstrong had said. It is the union's view that the employer took an uncompromising position on this issue without reasonable justification and was purposefully prolonging negotiations as a result.

121. There is no justification for this employer position, and it is indicative of the employer view that it could assert its will over the negotiations. The Board finds that this was simply another example of the employer taking an uncompromising position without reasonable justification, and behaving at the bargaining table in an unnecessarily bullying fashion.

122. **Miscellaneous Issues:** The union alleges the Clinic refused to discuss a number of the union's proposals, including language on contracting out, bargaining unit work, and operational changes (the use of VDT's while an employee is pregnant). It was the employer's position in negotiations that this was not the type of workplace where such language was needed, and that the Clinic wanted a pared down, simple collective agreement, not a normal collective agreement. The justification for wanting a simple agreement was that Mr. Johnson had worked at the Port Arthur General Hospital and had seen how expensive administering a collective agreement could be. On these issues the Clinic was completely unwilling to negotiate. As the Board has found earlier, there is no evidence before it that this was a unique workplace, nor why the provisions the union was seeking could not be negotiated. By simply refusing to negotiate, the Board finds that the Clinic took an uncompromising position without reasonable justification.

123. It is worth noting that Mr. Bickford had told Mr. Armstrong at one point in negotiations that the language the Clinic was seeking was in another collective agreement. There is no evidence before me that the collective agreement in question is a norm in the industry. However, although the Clinic had the collective agreement it was referring to, it never showed it to the union or informed it who the parties to that agreement were so that the union could get a copy of its own. In any event, the language the Clinic was seeking was more stringent than what was in the collective agreement referred to. Since the Clinic never shared this collective agreement with the union I have found the evidence about it to be of little assistance to me in reaching my decision. What was never discussed fully at the negotiating table cannot be relied upon after the fact, when the union is alleging that the employer had no justification for various of its apparently uncompromising positions.

124. The Clinic argues that it did not refuse to recognize the bargaining authority of the union and cites as examples that it installed a bulletin board in the Clinic when the union asked for one, it invited the chief steward to its health and safety meeting when there had been a water problem in the Medical Records area, and that Mr. Johnson talked to Mr. Armstrong, and gave him a tour of the Clinic when the employer was contemplating layoffs. While the Board is not unmindful of these gestures made by the employer, in the context of the Board's task pursuant to section 43(2), these actions are of little assistance to me in reaching my decision, because the focus of the section is on the process of collective bargaining and the bargaining positions taken by the parties.

125. On the issue of whether the Clinic took uncompromising bargaining positions without reasonable justification, the Clinic argues that "impasse" had not been reached because there was still "movement" on articles and everything was still negotiable. The employer characterizes as "movement" during bargaining the following events: the sending back and forth of comprehensive recitations of the proposals; the Clinic preparing comprehensive proposals; the parties' agreement on items; changing a word or phrase; when either party adopts the other's style of language or format for an article; and, when a party re-submits the same position again. In this vein, the Clinic argues that this application is premature as the union, with its new negotiator, should have given bargaining a chance. The employer relies on the fact that it always provided the union with comprehensive responses for the proposition that it was not taking an uncompromising position. Indeed, it characterizes the union's negotiating strategy on the last day of negotiations as being uncompromising because the union did not give a comprehensive response to the employer's package of the day before, but was insisting on dealing with packages of a few articles only or nothing.

126. It is disingenuous to characterize as “movement” or progress that which the Clinic relies upon. If that were the case a party could endlessly change a word or phrase, send proposals back and forth, and suggest that bargaining was still progressing. What the Clinic has called “movement” is what the Board characterizes as surface bargaining.

Setting bargaining dates and the time taken to negotiate:

127. The Clinic argued that it did not fail to make reasonable or expeditious efforts to conclude a collective agreement. A review of the evidence in regard to how the parties set bargaining dates, when and where they bargained follows.

128. As noted earlier, the union gave the Clinic written notice to bargain on June 12, 1995. On that date the union also requested information about the names, addresses, seniority dates and wage rates for bargaining unit employees, who the union would have contact with at the Clinic, copies of all employee benefit plans, and of employer policies relating to wages, benefits, and working conditions. One month later, on July 10, 1995, Richard Armstrong, the Vice-President and Local Director for the union, and its chief negotiator, again wrote to the Clinic because he had not received any of the information he had requested. On August 17, 1995 Mr. Armstrong wrote to Mr. Bickford again requesting the information and indicating he had drafted a collective agreement for consideration by the union’s negotiating committee but could not complete it without the information he had requested in June. He indicated the bargaining process would be frustrated without the information. The material was finally sent to the union on August 18, 1995, two months after it had been requested.

129. On August 25, 1995 Armstrong spoke to Mr. Bickford’s secretary about the setting of negotiating dates, and as a result, asked Mr. Bickford’s office to hold October 25, 26, 27, November 6, December 7, 8, 1995, and January 9, 10, 11, 1996 for negotiations, and to confirm these dates with the Clinic. At that early stage, Mr. Armstrong offered the use of the union boardroom for negotiations.

130. On September 8 the union informed the employer of who would make up its union negotiating committee, and on September 13, 1995 informed the employer that it had applied for the appointment of a conciliation officer. It appears this was the union’s normal practice in negotiations; Ron Gurevitch was subsequently appointed as the conciliation officer by the Ministry of Labour. On September 18, 1995, almost one month after the union had suggested dates for negotiations, the Clinic responded indicating that it was confirming its availability for all of the dates suggested except October 25, it asked the union to confirm its availability and whether the union would agree to a 9 a.m. start time, and indicated that the employer preferred to use Mr. Bickford’s law office meeting rooms for the negotiations. It is unclear why Mr. Bickford was looking for confirmation on the dates from Mr. Armstrong as those dates had been offered by Armstrong, and as Mr. Bickford’s secretary appears to have understood, were dates canvassed and confirmed with Mr. Armstrong.

131. It appears that by September 27, 1995 the Clinic had still not decided who would be on its negotiating committee, but had set negotiating dates. That day a partners meeting was held and it was decided that John Johnson, the Executive Director, and two very busy physicians, Dr. Rick Almond and Dr. Morris Mymko, would be on the negotiating committee. Mr. Johnson, on September 28, told Mr. Bickford’s office *not* to confirm the dates already confirmed, as he wanted to check the doctors’ calendars.

132. On October 6, 1995 Mr. Bickford wrote to the union and said that since the union had not confirmed the dates outlined earlier, he was now holding all of the October dates for an arbitration hearing, the January 9 date was not available for one of the doctors, and the Clinic was offering January 8, 22 and 29, 1996. He also now changed the meeting time for the start of negotiations to 4 to 9 p.m. for all negotiating sessions. In this letter Armstrong was asked to “address all future inquiries and

correspondence to” Mr. Bickford as counsel for the Clinic during the negotiations. On October 13, 1995 Mr. Armstrong spoke to Mr. Bickford’s secretary to advise her he was very frustrated about the dates, and that the October dates had been previously discussed. It appears that, in fact, Mr. Bickford was now available for the October dates, but at this juncture the doctors did not want to meet.

133. On October 16, 1995 Mr. Armstrong put in writing his concerns about the change of dates, and of the timing of negotiations. Nonetheless, the union agreed to meet at 4 p.m. at Mr. Bickford’s office on November 6. The union suggested that as a compromise to the meeting venue issue, that the parties alternate meeting places between Mr. Bickford’s office and the union office. Mr. Armstrong indicated he was not available on two of the new dates the Clinic was offering, but was available on January 10, 11, and 22, and suggested those meetings be held at the union office.

134. By a letter dated October 24, 1995 the Clinic firmly refused to meet at the union office or to negotiate for the full day on any of the confirmed dates, and reiterated it would only meet in the evenings. Mr. Bickford told the union he was not available on January 10 and 11, so the employer cancelled those dates.

135. On November 6, 1995, five months after the union had given notice to bargain, negotiating began with the union giving the Clinic its proposed collective agreement. At that session the union went through its proposal, and the rumours that the Christmas bonus and party were being cancelled were discussed. The Clinic said it would provide the union with further information about why the bonus and party were being cancelled, and said it would provide further January dates for negotiations. By November 20, 1995 the Clinic had not responded and the union wrote Mr. Bickford a letter asking about these matters, and suggesting that the parties try to find three dates in each of January and February, 1996.

136. Mr. Bickford responded to the union’s request on November 22, stating that the Clinic proposed January 9 and 25, 1996, and that all further negotiations would be starting at 5:30 p.m., rather than the earlier 4 p.m. Interestingly, it had been the Clinic which had previously said it could *not* bargain on January 9, and had cancelled that date. The parties had discussions and exchanged correspondence between November and early January regarding the union’s decision to file an unfair labour practice complaint about the alleged violations of the statutory freeze. The employer took the position that filing that complaint was a breach of the duty to bargain in good faith, and *it* filed its own section 96 complaint alleging that the union had breached section 17 of the Act. Thereafter, on January 16, 1996 Mr. Bickford wrote to Mr. Armstrong and said that it did not make sense to continue bargaining on January 22 and 25 as a result of the Clinic’s section 96 complaint. The union disagreed. Finally, on January 22, the date set for the negotiation, Mr. Bickford informed the union the Clinic would meet after all, but now at 6 p.m., later again than the previous sessions. The parties also met on February 13, 1996.

137. Ron Gurevitch, the conciliation officer, held a negotiation session with the parties on February 27, 1996 at a neutral site, the Airline Motor Hotel. Both parties agree that progress was made at that bargaining session. By a letter dated March 4 from Mr. Bickford, the next negotiations were set for March 19 and 26 at Mr. Bickford’s office, to begin at 6 p.m. Mr. Armstrong responded on March 14 asking that the parties meet at a neutral site, and that they share the expense. He asked for Mr. Bickford’s suggestions for a venue. By March 19 Armstrong had still not heard from Mr. Bickford. On March 19 Mr. Bickford responded in a letter that the Clinic saw no reason to meet at a neutral site and pay extra expenses for it. The Clinic proposed to keep meeting at Mr. Bickford’s office. Mr. Armstrong then sent back a letter, that same day, saying the union wanted to meet at a neutral site or cancel that evening’s negotiations. The flurry of correspondence continued, with the Clinic then saying it would agree to meet at the union’s office that evening, and alternate back to Mr. Bickford’s office for the next

session. However, the union office was not available. The union asked for more dates in April and May, and suggested the March 26 date be held at the union office. The Clinic agreed, and offered Mr. Bickford's office for that evening's negotiations, but refused to pay to meet at a neutral location. The March 19 negotiation session was cancelled, but subsequently the March 26 session was held at the union office.

138. On March 29 Mr. Bickford confirmed that the negotiations would continue on April 30, June 5, and 19, 1996. The venue was no longer an issue as the employer had finally decided to hold sessions at both Mr. Bickford's and the union's offices. On May 23 Mr. Armstrong wrote to Mr. Bickford suggesting that negotiation dates be set up in late June, July and August. On June 3 Mr. Armstrong cancelled the June 5 date.

139. Mr. Johnson was on vacation for the month of July, so he was unavailable for negotiations. Mr. Bickford, on July 18, offered one day out of four possible early August dates. By July 30, 1996 the parties had confirmed August 6 as the next date, and it is apparent that August 15 was being held by the Clinic team as a possible date. Mr. Armstrong, on July 30, asked that August 15 continue to be held, and he asked for more dates. On August 1 Mr. Armstrong wrote to Mr. Bickford to suggest that dates he knew Mr. Bickford was available be held for negotiations: August 15, September 16, October 10, 16, and 17. The parties never met on August 15, 1996 because the Clinic cancelled that date. On August 20 Mr. Armstrong wrote to Mr. Bickford stating he had still not heard anything about the dates he had proposed, and indicated it appeared that the Clinic was "intentionally attempting to frustrate the collective bargaining process". Mr. Bickford responded with a letter that same day indicating he would be on vacation for some time between the end of August and mid-September, but suggested the parties meet in late September. He indicated that his client was also concerned about the amount of time it was taking to do negotiations, and would like to move along more quickly. As a consequence of this, for the first time on August 27, Mr. Bickford indicated to the union that Garth O'Neill of his office would be available for negotiations while Mr. Bickford was away.

140. It appears that Mr. Armstrong was also not available, so the parties agreed to meet on September 16 for the next negotiating meeting. Mr. Johnson was away in the latter part of September, and Mr. Bickford was unavailable in the first three weeks of October, so the Clinic committee had no further dates to offer until late October, 1996. On September 5 Armstrong suggested negotiation dates of October 21, 29, 30, November 12 and 27. On September 10 Mr. Armstrong confirmed the dates of October 29, 30, and November 12 as negotiation dates.

141. The Board set October 29, 30 and 31 as dates in the section 96 complaints. The parties eventually agreed to adjourn these dates, and they met to negotiate on the evenings of October 29 and 30. By October 2 Mr. Johnson was asking Mr. Bickford to set more negotiation dates, and in particular he wanted a date between October 10 and 29. Mr. Bickford was apparently available on October 15, 16 and 25, although he had not indicated availability in August when the union had first offered October 16. In any event, Glen Oram was taking over negotiations from Mr. Armstrong, and was at this stage not available on any of the October dates now being offered. By a letter dated October 11 Mr. Oram informed the Clinic of his unavailability, and expressed his concern that the employer was now proposing additional dates on less than a week's notice, when it was almost impossible for the union to make itself available. Mr. Oram suggested that the parties meet during the day to speed up negotiations since the employer was now expressing some interest in getting the negotiations moving. This offer was never taken up by the Clinic.

142. At the October 29 meeting Mr. Bickford went through the Clinic's comprehensive response, with Mr. Oram attempting to get clarification of the employer's positions. Mr. Oram told the Clinic it was seeking articles no one would see in a collective agreement, and that the union must have in its

first collective agreement a union security clause. He indicated that if the employer would try to identify its “bottom line”, the union would too and the parties could move the negotiations along. Mr. Oram decided to take some risks by packaging some articles together and attempting to identify the things which were likely important to each side. He intended to group a few articles together, make some movement towards the employer’s position on some and to try to move the employer towards the union’s position on others, but the grouping would have to be accepted as a package. In the event that it was not, each party would revert to its original position.

143. Hence, the first package offered on October 30, 1996 included a union proposal that the employer and union would interpret the collective agreement in accordance with the provisions of the *Human Rights Code* and the *Employment Standards Act*; the union proposal for union security; a proposal that there be no discrimination by either party or any employee on the basis of membership or non-membership, or activity or lack thereof in the union; and the union was prepared to withdraw its proposed article on sexual harassment. When the employer returned the union’s proposal it did not accept it as a package, but only accepted the provisions where the union had moved towards the Clinic position. On the issue the union was most interested in, union security, the employer added a Letter of Understanding essentially allowing any current employee to opt out of union membership and the payment of union dues to the union if the employee asserted a religious belief or conviction. There was no further discussion on the package.

144. The union then offered a package in which it essentially accepted the employer’s management rights clause with the most substantive change being the addition of the word “reasonable” so that the employer could “make, enforce and revise from time to time *reasonable* rules and regulations”; in the Clinic’s complaints and grievance procedure provision the union was seeking to have the time limits apply only to the processing of a grievance, not to its initiation, and to soften the language on time limits; in the Clinic’s discharge grievance procedure provision, the union made some changes to modify the specific penalty clause to allow employees to be disciplined, up to and including discharge, for the employer’s list of infractions, but to allow employees the right to file a grievance; and, the union amended the Clinic language on the filing of a discharge grievance to include discipline or suspensions, to allow an employee 5 working (as opposed to calendar) days to file a grievance, and to have the employer notify the union within 3 working days of the dismissal of an employee. The Clinic response was to remove the word “reasonable”; to reinsert a provision that all of the Clinic’s pre-existing policies would continue in force unless inconsistent with the collective agreement; to essentially revert to its original proposal on specific penalties; to revert to the 5 calendar days, but to agree to tell the union within 5 calendar days of the dismissal of an employee. The package was abandoned.

145. The last package proposal the union made on October 30 was for the arbitration clause. The union proposed four names of arbitrators for the panel proposed by the employer, and asked for its language with respect to the general types of arbitration provisions about the composition of the board of arbitration, who pays the expenses of the board of arbitration, their jurisdiction, etc. The employer in response did not accept one of the union’s names for the list of arbitrators, substituted one of its own names with another name of its choice, and essentially re-submitted its own arbitration clause.

146. The parties accomplished nothing in the course of October 29 and 30, 1996. The Clinic was of the view that Mr. Oram had thrust a new approach to bargaining on them, and they were not used to it. It felt he had “broken the rules” by not simply going through the whole list of outstanding items as the parties had always done before. The union felt that as long as it bargained in good faith, it was prepared to try a new negotiating method to break the log jam. In Mr. Oram’s experience this had been an effective method of negotiating. Mr. Oram was of the view the employer was hardly moving at all on relatively straightforward issues, and he wondered what would happen when the parties got to what are usually contentious issues, like monetary items. The employer was refusing to agree to standard

clauses, and Mr. Oram felt there was no point in negotiating any further after the October 30th experience because if the employer had been serious about reaching a collective agreement, it would have taken some of the outstanding articles off the table after one year of bargaining. On October 30 the employer informed the union that it may be applying for a “no board” report from the conciliation officer.

147. On October 29 the employer had made a wage proposal that created a two tier system such that present employees would be paid at their present rate (but for working more hours) and new employees would be paid at a lower rate. Mr. Oram felt the employer could not be seriously negotiating if this was its opening position when it was not even moving on any language in the collective agreement. On November 1, 1996 the union sent the employer its wage proposal, seeking an increase.

* * *

148. It took four months for these parties to start negotiations after the notice to bargain had been given by the union. In all, the parties held 13 negotiating sessions over the course of the twelve months in which they met. Upon the employer’s insistence, the sessions were evening sessions held between approximately 6 p.m. and 9 or 10 p.m., of about four hour durations each. It is noteworthy that the employer started out suggesting a start time of 4 p.m., and gradually moved it to 6 p.m. At one point in June, 1996 the union suggested that the parties meet on a weekend so as to be able to negotiate for a full day, but that never happened. In early October, 1996 Mr. Oram again suggested that the parties meet during the day to speed up negotiations. There is no indication in the evidence that it was ever seriously considered by the Clinic. The Board is prepared to take notice of the fact that it is difficult for people to be as productive in the evening and night, after a full day of work, than they would be if they began a task first thing in the morning, or at any point during the day. Given the number of issues these parties had outstanding, and the slow pace of negotiations, it was unreasonable for the Clinic not to agree to some daytime negotiations during the year of bargaining.

149. While the employer suggested that both the union and the employer had had trouble in finding dates on which to meet, and while that seems to be true, on all of the evidence before me it was the union which consistently attempted to get the Clinic to commit itself to more negotiating dates, and it was not until early October, 1996 that the Clinic decided it wanted to speed up negotiations and so began to offer some dates. While it was the union which offered numerous dates from the start, by August, 1996 it had become even more concerned about the pace of negotiations. As is clear in the discussion about the negotiations, this was not a groundless concern. The Clinic on a number of occasions would not take dates the union offered, only to ask close to the date to meet to negotiate on a date *it* had earlier rejected.

150. The question of the venue of the negotiations should never have been such a point of contention, but the employer insisted that the meetings be held at the employer counsel’s office. Hence, although at the very outset of negotiations, in October, 1995, the union had suggested the compromise of alternating meetings at Mr. Bickford’s office and its own office, it was not until the fiasco of March 19, 1996 that the Clinic finally conceded to meet at alternating locations. It is self-evident that the union negotiating committee would like to meet on its own “turf” from time to time, and it was simply an unreasonable show of power on the part of the Clinic to force the issue to the March 19 cancellation of a negotiating date. The Board finds that this was an example of the Clinic refusing to recognize the bargaining authority of the union and of attempting to undermine the union.

151. The Clinic suggested that the union wasted negotiating time by bringing “operational issues” to the bargaining table for discussion. It was referring to Mr. Armstrong asking the Clinic about such matters as the Christmas bonus and party, about layoffs, and about a health and safety issue. I am satisfied that the union did not see itself as having any option but to bring issues to the bargaining

sessions for discussion because that is what Mr. Bickford had told Mr. Armstrong to do in a conversation on September 28, 1995. That admonition was followed up with a letter on October 6, 1995 wherein Mr. Bickford reiterated that he wanted Mr. Armstrong to “address all future inquiries and correspondence to me as counsel for the Clinic during these negotiations”. The only place the union could meet with both the employer and Mr. Bickford was at the bargaining sessions, so it is not surprising that it raised its concerns in that venue. In any event, in the course of negotiations which spanned one year it seems there were only three or four issues ever discussed, and it appears that an untoward amount of time was not spent on these matters.

152. The employer argues strenuously that if the union had not filed its first unfair labour practice complaint, then things would have moved along more expeditiously. It is suggested that the union spent its energy on preparing that complaint rather than focusing on the negotiations. The Clinic argues the union should have indefinitely adjourned that complaint as it was also bargaining for a provision in the collective agreement for superior benefits anyway, and the activity on the Board file was disruptive to the parties’ relations. The employer makes no mention of its own unfair labour practice complaint, and the effect it had on the negotiations. There is no evidence before the Board to suggest that the same persons who were negotiating also had carriage of the unfair labour practice complaint. Indeed, all of the correspondence with respect to the complaint came from Glen Chochla, the counsel for the union, and not from Messrs. Armstrong or Oram, who were the negotiators for the union. In any event, a party has the right to file an unfair labour practice complaint if it believes it has reason to do so. Furthermore, failure to do so in a timely fashion may even prejudice a union if it later seeks to rely on a stale allegation which had not been raised. The Board, in this instance can see no delay caused to bargaining as a result of the filing of the complaint.

153. The union argues that the employer had made the decision that the parties would go through all provisions of the proposed collective agreement at each bargaining session, and that between negotiating dates, the parties would exchange proposals through the mail. It is suggested that this method of negotiating slowed down the negotiations.

154. The evidence suggests that commencing from April 17, 1996, the union had agreed to this method of preparation between bargaining sessions. Hence, in May, June, September, and October there are examples of the union and employer sending each other updated versions of their respective proposals.

155. There is nothing particularly unusual in this system, and indeed, given the breaks between bargaining dates and the pace of negotiations, it appeared to have kept the parties doing something constructive between their meeting dates. I am of the view that this system was agreed to by the union, and that it did not, in itself, have any negative impact on the process of bargaining.

156. The Clinic has argued that the union’s change in negotiator had a deleterious effect on negotiations as Mr. Oram had not been present previously, and did not know how the parties had been bargaining. In addition, Mr. Oram introduced a new method of negotiating which the Clinic found unsettling. It ought not to be surprising to anyone that, when negotiations take more than a year, personnel changes may occur. In *The Boys’ Home*, cited above, the original union negotiator had to be replaced with a new negotiator when she went on sick leave. The Board in that case found that the new negotiator brought a fresh approach to the bargaining table and attempted to kick-start the stalled negotiations. In the case before me I am satisfied that Mr. Oram was an experienced negotiator, he had reviewed the parties’ progress to date, had prepared himself for the negotiations, and he did bring a fresh approach which he hoped would help the parties to get past some fundamental issues which, to his surprise, were still on the table after a year of negotiations.

157. On all of the evidence before me, and for the reasons outlined above, I am of the view the Clinic, by its decisions about when, where, and at what times it would negotiate, failed to make reasonable and expeditious efforts to conclude a collective agreement.

* * *

158. The union has argued that the Board should consider the evidence in the unfair labour practice complaints when it considers the section 43 application because what led to the unfair labour practice complaints was all a part of the context of the bargaining for a first collective agreement in this workplace. The Christmas party and bonus issues are clearly linked to the terms and conditions of work, and the employer let rumours about their cancellation filter out to the employees before the first day of bargaining in November, 1995. The union argues that the employer undermined the union's recognized bargaining authority by its actions, compounded by the comments made by Mr. Bickford at the bargaining table.

159. The union relies on the February 6, 1996 letter from the employer to all of the employees to suggest that the employer was purposefully making the employees feel insecure about their continued employment, and pointing to them the cost of bargaining a first collective agreement as a contributing factor in the Clinic's insecure future. The letter was compounded, according to the union, by the comments made by Dr. Maskey and Karen Menei about the need to decertify the union or else the Clinic would close.

160. Hence, the union asks that the Board consider the linkage between the unfair labour complaints and the first contract direction application, as the complaints show the poisoned atmosphere the employer created at the time the parties were supposed to be engaging in collective bargaining. In particular the union asks the Board to consider the evidence that at most union bargaining unit meetings for about a year before November 7, 1996, the employees of the Clinic asked questions about the Clinic closing, and the costs being incurred by the employer in the process of collective bargaining because they were concerned about their jobs. It is argued that the employer, by its actions complained of in the unfair labour practice complaints, undermined the union.

161. The Clinic argues that the unfair labour practice complaints and the section 43 application are separate and unconnected in subject matter, and that the Board should not consider the evidence in the complaints when deciding the first contract application. It argues there is no evidence that the events complained of emasculated the union, and suggests that it remained open to the union to engage in a strike or continue to bargain. The Clinic concedes that the Board can consider the section 96 complaints as part of the backdrop to collective bargaining between these parties. The employer states that the cases the union relies upon in its argument are distinguishable because all had a demonstrated lack of success in bargaining, and most of them had the employer taking uncompromising positions. There was also a pervasive pattern of negative conduct by the employer, which goes to the state of mind of the employer, and from which the Board can draw inferences about the employer's bargaining position.

162. The Board has, in the past, considered the impact of allegations made in a section 96 complaint when assessing the merits of a section 43 application. In *The Corporation of the Town of New Tecumseth*, (Unreported, Board File No. 3106-95-FC, September 26, 1996) the Board was asked to consider a union's allegations made in a freeze provision complaint, which had not been litigated at the time the parties were pursuing the section 43 matter. While the Board did consider the complaint, in that case the Board indicated that on the evidence before it, it could not find a failure to recognize the bargaining authority of the union.

163. In this case, although it was not necessary to do so for the purposes of my analysis of the evidence with respect to the bargaining itself, I have considered the section 96 complaints as they had

been heard and argued with the section 43 application, and do form a part of the background to the bargaining. Given my findings on the two complaints, I am of the view that the Clinic's breaches of the Act contributed to a poisoned atmosphere in the bargaining unit because the employer's actions set an early and negative tone in the bargaining, and encouraged a sense of insecurity among the employees, which grew as the bargaining extended over the course of a year. By the end of October, 1996 the employees of the Clinic had been certified for almost a year and a half, and had nothing to show for it but a growing sense of unease, fuelled by the employer's comments through its partners.

164. As the Board stated in *The Boys' Home*, cited above, "the risk that a party runs by simply exercising overt power is the potential for concluding its first set of negotiations at interest arbitration rather than by negotiated settlement". In the case before me it is apparent that because the Clinic had caused fear about job security and the viable continuation of the business of the Clinic, the employer did not believe that the union could mount an economic challenge to the employer's negotiating position. It therefore bargained from what it believed was a position of superior strength, and included a number of punitive elements in its bargaining positions. While the Clinic professed to want to move forward in the negotiations, it did not behave as if it wished to do so on October 29 and 30, 1996, or at any point in the year previous. Had it done so, such fundamental issues as union dues and union security would not still have been outstanding. It is disingenuous for Mr. Johnson to have testified at this hearing that everything was still negotiable when the Clinic had taken no significant steps to prove that, even in the face of the union constantly attempting to meet the Clinic part-way on the adoption of the Clinic's language.

165. On all of the evidence before it and for the reasons outlined above, the Board is satisfied that the Clinic's approach to bargaining was designed to not only defeat collective bargaining, but in the process to also communicate to the employees that unionization was not going to benefit them. The evidence suggests that bargaining unit members were constantly raising at union meetings their fears of the consequences of the cost of collective bargaining for the employer, and that the Clinic may close. The employer's proposals to reduce many working conditions below the *status quo* before certification seem designed to indicate to the employees that the union could not gain any tangible benefits for them, and had caused the reduction in what they had heretofore had. The fact that a termination application has been filed suggests that at least some of the employees got the employer's message. In all of the circumstances it is difficult to avoid the conclusion that the employer was unwilling to reconcile itself to a collective bargaining regime. In the course of bargaining, as evidenced by its positions on the probationary period; collective agreement coverage for employees over age 65; union security and dues, discharge, layoff, recall and job posting provisions; and the arbitration procedure, the Clinic tried continuously to maintain its unfettered discretion. It is apparent that the Clinic wished to continue to deal with its employees as though there had been no certification of a bargaining agent, and the Board finds this to be a refusal to recognize the bargaining authority of the union. For all of the reasons outlined above, the Board is satisfied that it appears that the process of collective bargaining has been unsuccessful because of the refusal of the employer to recognize the bargaining authority of the union, because of the uncompromising nature of the bargaining positions adopted by the employer without reasonable justification, and, due to the failure of the Clinic to make reasonable and expeditious efforts to conclude a collective agreement.

166. Having regard to the findings outlined in this decision, the Board finds it appropriate to direct that a first collective agreement between the Fort William Clinic and the Service Employees Union, Local 268, be settled by arbitration. Pursuant to section 43(23) of the Act, the termination application in Board File No. 2990-96-R is therefore dismissed.

Appendix "A"
The Labour Relations Act
NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

**THE BOARD, AFTER A LENGTHY HEARING, HAS DETERMINED
THAT THE FORT WILLIAM CLINIC HAS BREACHED SECTIONS
70, 72, 76 AND 86 OF THE ACT.**

**THE BOARD HAS ALSO DETERMINED THAT AS A RESULT OF
THE CLINIC'S ACTIONS DURING COLLECTIVE BARGAINING, IT
IS APPROPRIATE TO DIRECT THAT A FIRST COLLECTIVE
AGREEMENT BETWEEN THE FORT WILLIAM CLINIC AND THE
SERVICE EMPLOYEES UNION, LOCAL 268, BE SETTLED BY
ARBITRATION.**

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive days.

DATED this 11th day of June, 1997.

**2123-96-U; 3529-96-U Susan Wolframe, Carole Fawcett and Ethel Kemp, Applicants
v. Hill's Greenhouses Ltd., Responding Party**

Unfair Labour Practice - Union alleging that employer committing various unfair labour practices - Employer asserting that employees employed in horticulture and, therefore, that Labour Relations Act not applying - Board finding employees employed in silviculture and therefore covered by the Act

BEFORE: *M. A. Nairn*, Vice-Chair.

APPEARANCES: *Sean Fitzpatrick* for the applicants, *Donald Shanks* for the responding party.

DECISION OF THE BOARD; May 5, 1997

1. Board File Nos. 2123-96-U and 3529-96-U are applications filed pursuant to section 96 of the *Labour Relations Act, 1995* (the "Act") alleging that the responding party (the "employer" or "Hill's") has violated sections 72, 76, and 87 of the Act. At the outset of the hearing the employer took the position that the applicants were persons employed in horticulture and, pursuant to section 3(c) of the Act, the Board was without jurisdiction to entertain the applications, as the Act did not apply to them. The applicants took the position that they were persons employed in silviculture and were therefore covered by the provisions of the Act. I heard the parties' evidence and representations on the issue. This decision deals with that dispute.

2. Section 3 (b) and (c) of the Act provide:

3. This Act does not apply,

• • •

(b) to a person employed in agriculture, hunting or trapping;

(c) to a person, other than an employee of a municipality or a person employed in silviculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture.

3. Subsection 3(c) was first enacted in the statute in 1960 (then subsection 2(c)). Prior to that time subsection 3(b) had excluded "agriculture", "hunting", "trapping", and "horticulture". "Horticulture" was not qualified by any reference to "silviculture" or "municipal employees". In 1960 subsection 3(c) introduced the specific reference to "horticulture" and "silviculture" and has continued in that form since. I note that the passage and subsequent repeal of the *Agricultural Labour Relations Act, 1994* did not affect persons employed in silviculture. That Act did apply to persons employed in horticulture.

4. There is no dispute that if these applicants are employed in silviculture then the Act applies to them. Conversely, it is also agreed that if they are employed in horticulture, but not silviculture, the Act does not apply to them. The issue is what is meant by the word "silviculture" in subsection 3(c) of the Act.

5. Hill's Greenhouses Ltd. is a tree seedling nursery. While it also grows some poinsettias for the Christmas market and distributes and retails bedding and pot plants and some flowers, that work represents a small proportion of the business. Hill's receives orders and the seed from a license-holder for a particular forest stand, generally a forestry company such as Abitibi-Price, for tree seedlings to be used in the management and reforestation of the forest stand. Any forest management plan is regulated

by the *Crown Forest Sustainability Act*. Hill's business is the planting and growing in containerized lots of various species of trees seedlings to specified heights and diameters. Hill's has the knowledge to germinate, feed, thin, and harden the seedling and to monitor it for growth or disease. The specifications for the seedlings come from a Forest Operation Prescription or the silviculturist according to the site and the forest management objectives. The forestry company or other licence owner provides Hill's with, essentially, a custom order for tree seedlings to be grown and ready for planting in either one (usually) or two seasons. Hill's involvement ends with the delivery or pick-up of the tree seedlings to or by that customer. The customer is responsible for contracting for tree planting.

6. The sign at the entrance to Hill's identifies it as a silvicultural grower of trees. It provides in the range of eight million evergreen tree seedlings per year. In 1995 the IWA-Canada, Local 2693 sought and obtained bargaining rights on behalf of Hill's employees pursuant to the provisions of the *Labour Relations Act*. The decision dated July 24, 1995 certifying the trade union ([1995] OLRB Rep. July 970) notes that Hill's had originally maintained that one employee should be excluded on the basis that she was employed in horticulture. That objection was withdrawn and the decision also notes that the parties were agreed that the employees affected were employed in silviculture. Those bargaining rights were subsequently terminated in September, 1996 and these applications allege that the applicants have been subject to discriminatory treatment and reprisals as a result of their support for the trade union.

7. I heard evidence from Mr. H. Bax, a registered forester and silviculturist and from Dr. I. Smith, a horticulturist. The applicants agreed that these individuals were experts in their respective areas. I will review their evidence in conjunction with discussing the caselaw.

8. Evidence was presented as to the importance of timing in a tree seedling nursery. Germination and bud-set must occur within very small windows of opportunity in order for the nursery to meet the required specifications of the contract with the purchaser. A failure to do so results in a discounting of the contract price or possibly, although it appears rarely, rejection of the seedlings. However, neither party argued that this section of the Act ought to be interpreted on the basis of competing or particular labour relations considerations. It was argued on the basis of the usual meaning of the terminology used in the Act.

* * *

9. The employer argues that the question of whether or not tree seedling nurseries are part and parcel of a reforestation effort or whether they simply provide a product used in that work has not been determined. It asserts that the business of Hill's is horticulture on the basis of the additional business of growing poinsettias and the sale and distribution of other flowers. The employer relies on Mr. Bax's opinion that the tree seedlings are merely a product used in silviculture, but what is done at the nursery is not silviculture. The fact that the nursery grows trees does not, according to *Cedarvale Tree Services* *infra*, argue the employer, *ipso facto* make it silviculture. It also relies on Dr. Smith's view that the work is more akin to horticulture. The employer asserts that this evidence is uncontradicted and that the only conclusion the Board can reach is that the business of Hill's is horticulture and therefore exempt from the application of the Act.

10. The applicants argue that it is for the Board to interpret the Act not the witnesses. They note that horticulture and silviculture are not mutually exclusive terms. They rely on *Chatham Horticultural Society*, *infra* and *Cedarvale Tree Services*, *infra* to assert that horticulture involves "gardening" which they distinguish from a tree seedling nursery, an integral part of forestry. They took issue with Dr. Smith's conclusions on the basis that his definition of horticulture made no mention of gardening, but only talked of processes. They argue that different businesses might use similar processes but that did not make them the same business.

* * *

11. The employer submitted certain definitions which are useful to refer to at the outset. From the glossary to the Forest Management Planning Manual, pursuant to the *Crown Forest Sustainability Act*, “silviculture” is defined as:

Generally, the science and art of cultivating *forest* crops, based on a knowledge of *silvics* (URN 5384). More particularly, the theory and practice of controlling the establishment composition, constitution, and growth of *forests* (URN 5385).

12. “Silvics” is defined as:

The study of the life history, requirements, and general characteristics of *forest* trees and *stands* in relation to the *environment* and the practice of *silviculture*. (Aird)

The emphasis in the definitions is original and merely identifies that word as one also defined in the manual.

13. Those definitions contemplate silviculture as including the establishment of the forest, or, as Mr. Bax referred to, its renewal. There is no obvious basis for excluding controlled germination and early growth of tree seedlings in a greenhouse from less controlled practices that might occur in the forest stand. I was also referred to an excerpt from *Silvicultural Terms in Canada*, second edition, produced by the Policy, Economics and International Affairs Directorate, Canadian Forest Service, Natural Resources Canada, Ottawa, 1995. Part I of that publication provides an overview of Canadian silvicultural practices. The employer referred to a portion which distinguishes silviculture from forest management and states that silviculture (at page 7):

consists of actions *taken at the level of individual stands* to renew and enhance the forest crop to meet stand management objectives for timber, wildlife, recreation, landscape design, preservation, and water yield.

[emphasis added]

It is not clear that the words “taken at the level of individual stands” refers to work performed out in the forest, as opposed to work undertaken in order to meet objectives designed for a particular or individual stand.

14. The publication goes on to identify and discuss “basic”, “intensive” and “special” silvicultural practices. Included in the discussion of basic practices is the use of artificial means to regenerate forests for a variety of reasons which include unreliable natural regeneration, species control, beneficial breeding, and timing considerations. Still within that discussion of artificial regeneration is a discussion of “nursery practices” (at page 12):

Seedlots of species selected as suitable for specific forested sites are sent to forest nurseries for the production of planting stock. Originally, most planting stock was produced in bare-root nurseries, where the seed was sown on raised beds, covered with protective grit or sand, grown for one or two years, and then either outplanted in the forest, or transplanted in the nursery for a year or two to grow bigger before outplanting.

Currently, most nursery stock is raised in containers in greenhouses under more controlled temperature and moisture conditions and is irrigated with standardized nutrient solutions. Container seedlings grow faster, are more uniform, and are often cheaper to produce; however, they are often less able to compete after outplanting than bare-root stock. The stock type is usually ordered and custom grown one to three years in advance of outplanting. Current Canadian production is approaching one billion seedlings per year, grown in government and private nurseries. Much planting stock is held in cold storage following lifting, then trucked various distances to planting sites. Over 95% of

the production is conifer, two-thirds pine and spruce species. There is a limited production of poplar raised from cuttings.

This description very closely reflects the work done by Hill's.

15. The employer also referred to and relied on a portion of the publication which notes that (at page 17):

The management of forest-tree nurseries is highly specialized and more akin to agriculture than to silviculture.

16. Notwithstanding the comparison, this commentary is contained in a discussion of "nursery management" found within a broader discussion of "special" silvicultural practices.

17. In contrast, the Board in *Chatham Horticultural Society, infra*, adopted the interpretation given to the term "horticulture" used by the Ontario High Court in *Regina v. Ontario Labour Relations Board, ex parte Cedarvale Tree Services Ltd.*, (1970), 15 D.L.R. (3d) 413 (upheld on appeal, see *infra*):

..."horticulture" means gardening and that in the statute it covers every kind of garden and garden work known in Ontario. It includes, among much else, work in ornamental gardens, botanical gardens and arboreta, tree nursery work, the development and care of civilized parks and urban and suburban roadsides, the care of individual shrubs and trees, topiary work, garden designs, landscaping and garden care. But it only includes those functions in connection with gardens of some kind.

* * *

18. I now turn to the caselaw and to the opinion evidence provided. The following cases were reviewed by the parties; *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183*, [1971] 3 O.R. 832 (C.A.); *McLean-Peister Ltd.*, [1962] OLRB Rep. Nov. 290; *Spruce Falls Power and Paper Company Ltd.* [1963] OLRB. Rep. Sept. 327; and *Chatham Horticultural Society* [1980] OLRB Rep. Apr. 409. The decision in *Spruce Falls* is somewhat factually comparable. These cases provide some historical perspective and I will review them in chronological order.

19. In *McLean-Peister, supra*, the union applied to be certified. The employer took the position that its primary business was horticulture and therefore outside the scope of the Act. The provision under consideration was the same, although then subsection 2(c). The Board found that the employer was carrying on the business of "landscape gardener and nurseryman". It operated a store which sold gardening equipment and tools, and it sold shrubs, small trees, flowers and seeds. As well, it had two nurseries and a 70-acre turf (sod) farm. Three-quarters of its sales involved commercial, industrial and institutional landscaping, of which at least fifty per cent was grass seeding work. The nursery stock used in the landscaping work came from the company's nurseries.

20. The job giving rise to the application for certification involved a sodding contract. The work was performed by labourers. The Board concluded (at page 293):

Having regard to the operations of the respondent and to the work performed by the employees on the project involved in this application, all as outlined above, *we are of the opinion that the primary business of the respondent falls within this definition [of horticulture], as does the employment of the employees in question...* It appears to us that some work on construction sites may very well be horticultural by nature. *But what is important is what is being done, not where it is done.*

Having reached this conclusion it is not without interest to note that the Select Committee on Labour Relations in its report dated July 10, 1958, recommended under the heading 'Horticulture' that The Labour Relations Act should be amended 'to permit those persons who are now employed

by Nursery Companies, by Reforestation programmes, and Landscaping, to come under the provisions of this Act'. While the Act was subsequently amended, the amendment did not go nearly so far as the recommendation. In the words of the Commentary on The Labour Relations Amendment Act, 1960, which document was handed out to all members of the legislature on the introduction of the Bill in the House, 'The Act is extended to employees of municipalities engaged in horticulture (e.g. employees of parks departments) subject to section 78 of the present Act, to persons employed in reforestation programs, and to employees of employees [sic] of employers who engaged in horticulture only as a 'side line', e.g., employees who look after flower beds and lawns of industrial plants'.

There is no suggestion here that employees now employed by Nursery Companies and in Landscaping were to be brought under the provisions of the Act.

(emphasis added)

21. The decision is not directed to the exception in respect of silviculture as the work concerned in the application was with respect to sod. To the extent there is any relevant reference, it is ambiguous and drawn not from the words of the statute but from a committee report and a legislative commentary. On the one hand it is suggested that persons employed in reforestation programs were intended to be covered by the Act. On the other hand, it is suggested that persons employed by nursery companies were not to be brought within the scope of the Act. The scope of the terms "reforestation programs" and "nursery companies" are not discussed. The reference is made in the context of a sod farm that grew a wide variety of nursery stock and was not involved in growing tree seedlings for use in reforestation.

22. In September 1963 the Board had occasion to deal more specifically with the definition of "silviculture". The certification application dealt with by the Board in *Spruce Falls Power and Paper Company Limited*, *supra* was in relation to that employer's tree seedling nursery. The description of the work affected by that application was set out, in part, as follows (at page 327):

The Spruce Falls Forest Nursery was established in 1947 to supply trees for the reforestation of the cutover on the limits of the Spruce Falls Power & Paper Company Ltd. This nursery has been built and is operated by the company without government aid or subsidy. Since its establishment in 1947, the Spruce Falls nursery has operated outside the jurisdiction of the union. Local 2995 applied for certification in 1956, but was turned down by this Board. Conditions have not changed since that time.

At the forest nursery, trees, mainly spruce and jackpine, are grown from seed to four years of age. The seed is sown in very carefully prepared seed beds in late October. The seeds germinate the following spring and are grown for two years in the seed beds. They are then lifted, graded and transplanted. The transplanting is done by an adapted celery transplanter. This transplanting gives the seedlings more space for the development of a good root system. At four years, i.e. - after two years in the transplant lines, the trees are lifted, again graded, and the acceptable stock is baled and shipped to the bush for planting on those parts of the cutover where natural regeneration of spruce is insufficient.

The planting in the cutover is not done by nursery employees, but by woods workers who are transferred to planting from other woods jobs such as cutting. Thus the planting in the bush is not included in the nursery operations which are being considered by this [B]oard.

Reverting now to the nursery operations, the equipment in use is farm equipment and the work is very seasonal and very dependent upon the weather. The fields are operated on a four year rotation. During the first two years cover crops such as rye, vetch, oats or buckwheat are grown and ploughed under. Fertilizer is added and the soil is worked up to a good tilth. During the next two years trees are grown and the cycle is then repeated.

While the trees are being grown, the seed beds and fields are irrigated regularly by means of a portable irrigation system. The fields are cultivated and weeded and are treated as necessary to control insects and disease.

The nursery labour force consists principally of labour drawn from the farming area around Moonbeam and comprises about 45% women. The forest nursery opens in late April with two or three experienced men engaged to do the preparatory work. Once the fields and soil are free of frost and snow, transplanting begins and the labour force rises to about 35 or 40 for two or three weeks. Transplanting is very seasonal and dependent on the weather. The help is mainly temporary, although most return year after year. By late May, transplanting is completed and the labour force drops sharply and in June is reduced to the regular group of six men and six women.

23. The 1956 application for certification referred to had been dismissed on the basis that the persons employed were engaged in agriculture and were therefore excluded from the operation of the Act. In 1960 the Act was amended to its current form. As a first issue, the Board concluded that employees employed in silviculture were covered by the Act. The Board considered the somewhat ambiguous comments from *McLean-Peister, supra*, referred to above and concluded that, as a matter of statutory interpretation, persons employed in silviculture were not excluded from the operation of the Act under the term “agriculture”. There was no dispute before me on that issue; the issue was specifically the scope of the terms “silviculture” and “horticulture”.

24. The Board considered whether the employees were employed in silviculture. After reviewing dictionary definitions of the term “silviculture” the Board concluded (at page 331):

It was argued by the respondent that silvicultural work is what is done in the forest itself and not what is done in the company's forest nursery. *In determining whether or not the work done falls within what is meant by silviculture we think it is more important to look at what is being done rather than where it is done.* The forest nursery is operated for the sole purpose of supplying trees for the reforestation of the cutover on the limits of the respondent company. In this respect it is an integral part of the company's reforestation operations. Even if the employees of a nursery confined to the production of trees in other circumstances or for other purposes would be considered to be employed in agriculture or horticulture, and we refrain from expressing any opinion one way or the other as to that, we must find in the circumstances of this case, that The Labour Relations Act does apply to the persons in question employed at the company's forest nursery.

[emphasis added]

25. In a dissenting opinion the Board Member noted that the earlier application had concluded that the work was “agriculture” and that the parties had agreed that there had been no change to the operations under consideration. He went on at some length to consider the definition of silviculture from various sources and concluded (at page 339):

The persons employed at the respondent's tree nursery do not enter the forest and the persons employed in silvicultural work in the forest do not work at the tree nursery. They are distinctly separate operations. Tree nurseries are sources of supply for seedlings to be planted in the forest to assist nature in the regeneration of the cutover areas. It is the permanent planting of the seedlings in the forest itself that is the silvicultural operation and not the growing of the seedlings at the nursery.

26. That latter argument was essentially the one put before me. The evidence in both cases is similar except for the actual ownership of the nursery. In this case the tree seedlings are cultivated by an employer in an arms-length relationship to the user of the seedling, the holder of the licence. However the work is the same as in *Spruce Falls*; to produce tree seedlings for use in the reforestation of stands. The methods are somewhat different as Hill's utilizes the more highly controlled environment of greenhouses rather than outdoor seed beds. I am not persuaded that that distinction is of real significance. The greater degree of control that is able to be exercised over the seedlings in the greenhouse environment represents a greater application of scientific method and intervention in the

“cultivation” of the tree seedling, resulting in greater efficiency and greater quality and consistency of seedling. It may be that the method more closely resembles a “production” method. The essential nature of the work however is the same.

27. Subsequently, in the early seventies, the Board again had occasion to consider these statutory provisions. In *Cedarvale Tree Services Ltd.*, [1970] OLRB Rep. Feb. 1305 the Board held it had jurisdiction to consider that application for certification on the basis that the activity engaged in by Cedarvale was not “horticulture” as it was “not primarily concerned with growth”. Judicial review of that decision was successful and the matter then proceeded to the Court of Appeal. The issue in that case was whether or not the business activity was properly described as horticulture.

28. Cedarvale was described as a “specialist in trees”. The general nature of its business was the treatment of trees, that is, pruning, stump and tree removal, lighting treatment and protection, cabling and bracing treatment, spraying, cavity treatment, bark tracing, feeding and fertilizing, and other incidental services concerning trees. The work was performed on individual trees, not wood lots. Cedarvale also performed pruning and clearing work for a hydro company in order to keep hydro lines clear. It did very little tree planting and was not involved in the cultivation and preparation of soil.

29. There was no suggestion in the case that the work being performed was silviculture. However the Court of Appeal did note that silviculture is a division of horticulture. In reviewing the legislative amendment, Mr. Justice Arnup, writing for the Court stated (at page 837):

... The significant thing to me about the new clause was the exception from the exclusion (“any person, other than ... a person employed in silvaculture, who is employed in horticulture”). Silviculture (sometimes spelled silviculture) is the cultivation of forests, and the necessary implication from this exception from the class of persons “employed in horticulture” must be that silvaculture was regarded by the Legislature as a division of horticulture, and that employees engaged in silvaculture would otherwise have been excluded from the Act by the exclusion of persons “employed in horticulture”. Clearly, then, the Legislature treated the word “horticulture” as including the cultivation of trees, including trees in forest form.

30. The Court considered the Latin roots to the term “horticulture” meaning “garden” and “cultivation” and found that it included the care, treatment and cultivation of trees. The Court disagreed with the Board’s finding that the work was not horticulture because it was “not primarily concerned with growth” and overturned the Board’s decision.

31. I note that in *Cedarvale Tree Services* the Court of Appeal did agree with the Board when it concluded it was not required to, nor did it need to rely on expert evidence to determine the meaning intended by the Legislature. The Court did however have regard to dictionary references in reaching its conclusion.

32. In *Chatham Horticultural Society*, *supra*, the Board concluded that the primary business of that employer was horticulture and accepted the definition set out in *Cedarvale Tree Services*, *supra*. The employer was engaged in the beautification of Chatham’s public grounds by the planting and care of trees, shrubs, and flowers in gardens, pots and boxes. The employees prepared the soil, planted and maintained flowers and trees, and maintained grass areas. Garden work continued through the propagation of plants in greenhouses for use in the public gardens the next year. Any maintenance activities were all directed to the horticultural activity.

33. The Board noted that the term “horticulture” should be interpreted strictly, given its exclusionary nature, but noted the decision of the High Court in *Cedarvale Tree Services*, upheld on appeal, that Cedarvale employees who spent “significant time and effort in [horticulture]” fell within the exclusion.

34. Returning to the statute then, subsection 3(c) is appropriately interpreted to mean that the Act does not apply to a person employed in horticulture by an employer whose primary business is horticulture (subject to the exception discussed below). That exclusion contemplates a two-fold inquiry; first, what is the primary business of the employer. If that primary business is horticulture then a second question arises; what is the work of the person employed. If the answer to both questions is “horticulture”, the Act does not apply to that person. If the person, although employed by an employer whose primary business is horticulture, is employed in work *other* than horticulture, the Act applies to them.

35. As found in *The Jackson-Lewis Company Limited*, [1981] OLRB Rep. Dec. 1794 the Act does not exclude “horticulture” *per se*. The Board noted the corollary that the Act does not exclude employees who are employed in horticulture work by an employer whose primary business is *not* horticulture. The two-fold inquiry must result in an affirmative answer to both questions before a person is subject to the “horticulture” exclusion under the Act.

36. Then there is an exception. The Act also provides that even if an employer’s primary business is horticulture *and* the person is employed in horticulture, that person is still not excluded from the application of the Act if they are employed in silviculture or are an employee of a municipality.

37. Thus the Act contemplates that the primary business may be horticulture but the work performed by the employee, silviculture, and that the Act would apply to that person. This interpretation is consistent with the Court of Appeal’s comments in *Cedarvale Tree Services*, *supra* which recognized that silviculture is a division or sub-set of horticulture.

38. A similar test can be utilized to determine whether a person is employed in silviculture (or horticulture) to the test used in both *Cedarvale Tree Services* and *Chatham Horticultural Society* in determining the primary nature of the business. If the employee spends significant time and effort in silviculture (if it is their “primary” employment), they are so employed.

39. In the case before me, the employees spend significant time and effort in the planting, cultivation, and care of tree seedlings for use in reforestation programs. Dr. Smith, a horticulturist, testified that in his view this work was closer to horticulture than to silviculture because of the greater capital and labour intensity of the work.

40. In a letter prepared for these proceedings he comments:

Definitions which separate horticultural enterprises from agronomic, and silvicultural enterprises, generally refer to the size and intensity of the operation and the practices involved in crop production. The former are intensive in their use of capital, space, protective structures, management and in particular labour - in comparison with the latter which are extensive by nature.

• • •

A debate over whether [tree seedling nurseries] can be more closely allied with extensive forestry/silviculture practices **because they involve the growing of forest trees per se**, or whether they are allied to agricultural/horticultural enterprises because of the intensive nature of their operation and use of capital and labour **may ensue**, or may have been defined by some act. In my opinion, the practices involved in the production of tree seedlings have more in common with the latter.

[emphasis in original]

41. Dr. Smith differentiated horticulture from other cultures on the basis of the intensity of the practice; the use of greenhouses with high heating costs, expensive capital equipment, highly controlled environments. He also discussed that the work is labour intensive and operational risks are high.

42. I do not find this to be particularly helpful. These distinctions do not appear in the statute and the Court of Appeal has rested its view on the traditional and “lay” definition of horticulture as having to do with the culture of gardens. Hill’s specifically agreed that silviculture was a division or sub-set of horticulture, as set out in *Cedarvale Tree Services*. If silviculture is a part of horticulture one could reasonably expect to find similar practices being utilized to some extent in both. Dr. Smith did agree that one significant difference between tree seedlings and bedding plants was the “product”. He also agreed that tree seedlings are an integral part of the forestry industry.

43. To highlight the difficulty of simply adopting the view of the witnesses was the fact that Dr. Smith testified that Hill’s is a member of the Ontario Federation of Agriculture recognizing, he stated, that Hill’s is involved in agriculture. If a person is employed in agriculture then the Act does not apply according to subsection 3(b). Notwithstanding the pre-amendment treatment of the first certification application in *Spruce Falls, supra*, the employer here did not assert that position.

44. Mr. Bax testified that in his opinion the work was not silviculture as it did not occur out in the forest stand. He essentially agreed with the dissenting Board Member’s view in *Spruce Falls, supra* that the nursery was a source of supply of a product to be utilized in the practice of silviculture. He likened it to the manufacturer of a band-aid or other medical supplier as not engaging in the practice of medicine.

45. Mr. Bax’s written opinion states that a silviculturist is one who tills or cultures the forest. He compares that to a horticulturist as one who tills the garden and an agriculturist as one who tills the field. This comparison is also of little assistance. If “horticulture” and “silviculture” were separate and distinct activities, it would only be necessary to refer to “horticulture” to accomplish its exclusion, without in any way affecting silviculture. Silviculture would be understood as something distinct and employees engaged in that activity would remain within the scope of the Act; a result that the parties agreed is the one intended by the subsection.

46. Mr. Bax testified that experience in a tree-growing nursery would not qualify one as a silviculturist. Silviculturists, in his view, work in the forest, managing and manipulating the forest for various objectives. He included renewal of the forest as part of the work, but drew a line at the nursery as the place from which products were ordered that were needed to accomplish the renewal.

47. The difficulty is in trying to apply Mr. Bax’s comments to the task of legislative interpretation. The Act does not refer to “silviculturists”. It uses the term “silviculture”. In effect Mr. Bax says that silviculture is something practiced only by silviculturists. By logical extension, the Act applies only to persons such as Mr. Bax. However that is not a logical interpretation of the subsection. It would mean that the Act would not apply to tree planters or other persons engaged in labour in the forest, carrying out the work required to implement the decisions of the silviculturist to meet the determined objectives. I do not doubt Mr. Bax’s comments that experience in a tree-growing nursery would not qualify one as a silviculturist. Nor would working as a tree planter out in the forest stand. Yet neither the employer or Mr. Bax appeared to dispute that tree planting formed part of the practice of silviculture. The term “silviculture” must, in my view, refer to the work required in the practice of silviculture. Where does that line fall? Must one be working *in* the forest to be employed in silviculture?

48. The Board utilized the same approach in both *McLean-Peister, supra*, and *Spruce Falls, supra*. It reviewed dictionary meanings of the term silviculture, including occupational titles which defined a silviculturist as a specialist in the “establishment and care of forest stands ... through the operation of trees [sic] nurseries...”. The Board concluded that it was more important to look at *what* was being done rather than *where* it was done; that the work of the tree seedling nursery was an integral part of the employer’s reforestation operations. The fact that Hill’s is owned and operated by an employer not related to the forestry company purchaser does not alter the integral nature of the work

performed to the forestry industry and any reforestation efforts. I am also not persuaded that tree seedlings are appropriately described as “products” utilized in the practice of silviculture. The essence of silviculture has to do with the long-term cultivation, growth, care, and management of those very trees, in the context of the forest stand for which they have been selected.

49. Nurseries whose business is not the cultivation of tree seedlings for use in the establishment and/or renewal of forests and which do not employ persons in that activity would be excluded from the operation of the Act by virtue of the exclusion of “horticulture”. However, I am satisfied that Hill’s Greenhouses Ltd.’s primary business is producing tree seedlings for reforestation efforts. Further, I find that the employees performing that work are employed in silviculture. The Act therefore applies to these applicants and the Board has the jurisdiction to entertain the applications.

* * *

50. At the conclusion of hearing this preliminary matter I had discussions with the parties concerning certain other preliminary matters. The parties are agreed that if the Board found that it has jurisdiction to proceed then a further application filed as Board File No. 4203-96-U is to be consolidated and proceed with these matters.

51. There were outstanding production issues. The employer has agreed to produce to the applicants any time sheets for Ethel Kemp for the period 1985-1996. In addition, the employer is to produce any notes or documents related to Allen Tower’s investigation of Ms. Wolframe’s allegation that Ron Vilim struck her; including any notes of Mr. Tower’s questioning of Ms. Fawcett, Mr. Vilim, or other employee, including, Gloria Hintikka, Susan Tulkki, and Yvonne G. The applicants are to produce any of their notes or records relating to the alleged assault, including any documents or statements given to police and any notes of Dr. S. Inovye. The employer acknowledged that certain of these documents or notes may be outside the control or custody of the applicants and not then subject to this direction.

52. The employer has raised a further preliminary issue relating to the timeliness of certain allegations. The employer argued that this objection also raised an issue as to whether certain matters ought to proceed on the basis that the union then representing the applicants is alleged to have raised the same matters in earlier proceedings which were either withdrawn or otherwise dealt with. On a review of the matters, the employer agrees that all the allegations raised in these proceedings have been raised for the first time with the exception, it asserts, of the issue of Ms. Wolframe’s seniority date. The applicants dispute this assertion. Therefore, there is an outstanding preliminary objection with respect to the timeliness of various allegations (an issue concerning the Board’s discretion whether to inquire into certain allegations on the ground of the delay in raising them) and on a separate ground, whether the allegation concerning the employer’s treatment of Mr. Wolframe’s seniority date ought to proceed on its merits. The parties are agreed that it will be necessary to call evidence with respect to these preliminary matters.

53. These applications and Board File No. 4203-96-U are hereby referred to the Registrar to schedule a hearing for the purpose of hearing the evidence and representations of the parties with respect to any and all issues in dispute. This panel is not seized.

2286-95-R Hotel Employees Restaurant Employees Union, Local 75, Applicant v. Hilton Canada Inc. and Sizzling in Toronto, Inc., Responding Parties

Sale of a Business - Board dismissing application for successor rights resulting from closing of restaurant in Toronto hotel and subsequent opening of steakhouse in same premises

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *O. R. McGuire* and *P. R. Seville*.

APPEARANCES: *Pierre Sadik* and *Bobbi Kerwin* for the applicant; *Brian McLean* and *Laura Myers* for the Toronto Hilton, *E. L. Stringer* and *E. Hollyer* for Sizzling in Toronto.

DECISION OF THE BOARD; May 5, 1997

1. The style of cause is hereby amended to reflect the correct name of the responding parties: "Hilton Canada Inc. and Sizzling in Toronto, Inc."
2. This is an application for successor rights resulting from the closing of the Trader Vic's restaurant in the Toronto Hilton and the subsequent opening of a steakhouse known as Ruth's Chris in the same premises. The responding party "Sizzling in Toronto, Inc." runs Ruth's Chris. The parties will be referred to below as the union, the Hilton and Ruth's Chris.
3. The union takes the position that a sale of business has occurred because of the transfer of location and goodwill as well as the relationship of the business of Ruth's Chris to the hotel. The hotel and Ruth's Chris maintain that nothing was left of the Trader Vic's business to be sold, and that all that the hotel did was lease space; neither Trader Vic's nor the hotel sold any of its business.
4. There were eight days of hearing over the better part of a year during which we heard evidence from four witnesses called by the responding parties. The union called no evidence. The facts are not substantially in dispute. It is their legal characterization which divides the parties.

The Facts

5. After more than 18 years in the building which is now the Toronto Hilton, Trader Vic's closed on December 23, 1993. It had been losing money and the hotel decided not to renew its lease. For approximately 18 months thereafter, the premises were vacant while the hotel attempted, through a commercial real estate agent, to find a new tenant. The Hilton did not restrict itself to restaurants as prospective tenants. It was searching for any tenant relationship capable of generating a reasonable return. Alternatives considered included using it as an additional ballroom or function room, and leasing it to a private medical service or indoor golf facility. On August 21, 1995 the new tenant opened Ruth's Chris Steak House in the same part of the basement premises previously occupied by Trader Vic's.
6. The 25 employees who worked at Trader Vic's at the time of its closing were employees of the Hilton and were covered by a collective agreement between the union and the Hilton. A number of these employees were laid off as a result. Some Hilton employees who worked in other restaurants at the Hilton were "bumped" by employees from Trader Vic's who transferred into their positions. The union wishes its bargaining rights to apply to the employees of Ruth's Chris as it did to those at Trader Vic's.
7. No transaction occurred between Trader Vic's and Ruth's Chris nor were any managers or employees transferred from Trader Vic's or the hotel to Ruth's Chris. However, their relationships with the Hilton are argued to have been similar enough to support a finding of a sale of a business. Thus, we

will set out the relevant facts of the relationship between Trader Vic's and the hotel and compare them to the situation with Ruth's Chris.

8. The Hilton manages the hotel complex at 145 Richmond Street West under a management agreement with the hotel's owner, Ceasar Park Hotel Investment Inc., formerly Westin Hotel Company Limited (referred to as Westin below). Hilton is Westin's agent. In this capacity, it leases space to various tenants including a beauty salon, news kiosk and a clothing store. When Trader Vic's was in the Hilton premises, it operated under a management agreement between Westin and Trader Vic's, a California based chain. It was one of the agreements taken on when the Harbour Castle and the Hilton hotels were "swapped" in the early 1990's. The agreement specifies that the hotel will pay a management fee to Trader Vic's, and that the relationship was not one of landlord and tenant. The evidence was that Hilton covered all operational expenses for Trader Vic's and was responsible for ensuring that the restaurant made a profit and that its operation met very detailed specifications set by Trader Vic's. Trader Vic's did catering for the Hilton and its guests; food and beverages from Trader Vic's were often sold by Hilton as part of its convention and catering business.

9. Horst Angelkotter is Hilton's general manager. As to whether a restaurant such as Trader Vic's was integral to the Hilton's business, in terms of its guests needs, Mr. Angelkotter testified there "was always a need for an additional restaurant if you can get one" and he thought hotel guests were a significant portion of Trader Vic's clientele. He said the reason a hotel has a restaurant is to cater to both guests and local customers. At all relevant times the hotel has operated a restaurant on the lobby level, which serves breakfast, lunch and dinner. Neither Trader Vic's nor Ruth's Chris served breakfast, and Mr. Angelkotter considered them "specialized" restaurants. Mr. Angelkotter testified that the hotel needed a specialized restaurant serving dinner; he considered it a plus from a marketing point of view to have Ruth's Chris on the premises as he had initially with Trader Vic's. He thought the marketing department had given a Hilton logo to Ruth's Chris to use, but was not sure if they had used it.

10. For its part, Ruth's Chris does not consider itself an integral part of the Hilton's business as the chain has its own clientele to whom they market. Ruth's Chris is part of a chain of 48 steak houses with its head office in Louisiana, USA. Ruth's Chris engages in comprehensive marketing for the chain throughout north america which includes advertising in travel publications, newsletters, posters and buttons announcing new restaurant openings and a fan club, "the Steakhouse Gang". The advertising emphasizes the "product" of the steak itself and encourages identification of the name with the image of the steak. Staff are trained to provide a consistently high level of dining experience throughout the chain. The target market is the male professional between the ages of 35 and 65.

11. Ruth's Chris occupies the space formerly occupied by Trader Vic's, pursuant to an October 1994 lease between Westin and Ruth's Chris negotiated by Hilton. The rent was free for the first year and based on a percentage of sales thereafter. Mr. Angelkotter testified the hotel was selling space and location, and that in return Ruth's Chris also got an association with the Hilton name. Mr. Angelkotter thought it an ideal location for Ruth's Chris because of the association of the two names.

12. Ruth's Chris was solely responsible for financing, designing and constructing the substantial renovations to the leased space. With the exception of some oven venting, which is built into the building, and built-in refrigerators, the premises were gutted and completely rebuilt from the wall in by Ruth's Chris.

13. The cost to Ruth's Chris new kitchen equipment alone was approximately \$200,000.00. entirely new dining rooms and bar area were built and furnished at a cost of approximately 1.6 million dollars, including demolition and reconstruction. Ruth's Chris insisted on a 10 year lease - longer than the standard three to five year lease with other Hilton tenants - because of the extensive capital investment they were making.

14. Settling on the Hilton site was the end of a process that had started several years earlier for Lana Duke, the owner of Ruth's Chris Toronto franchise. After an unsuccessful search for an affordable Toronto site in 1991, Ms. Duke abandoned Toronto and instead opened a restaurant in San Antonio, Texas in mid-1992. In late 1993, she revived her search for space in Toronto. A feasibility study and a location analysis were done. Using the same real estate agent as the Hilton, she narrowed the choices to two - the old Trader Vic's space and a free standing location on King St., based on factors such as the size of the kitchen required and the need for it to be downtown. Although Ms. Duke preferred the King St. location, the owner never made an acceptable offer. as a result, she settled on the Hilton, as it was easy for both the local and travelling client to get there. She testified she got space and a downtown location in return for the best rent offered for a Ruth's Chris in North America.

15. Lana Duke felt the Hilton location was neutral to her business, as long as the customer could get there conveniently, since Ruth's Chris has its own identity. She was of the view that people pick a hotel to sleep in and a restaurant to eat in, noting her view that the Hilton is not associated with fine dining. She said she thought travellers might try the Hilton because the restaurant was in it, rather than vice versa. In other cities, Ruth's Chris' restaurant draw about 60% of their clientele from local businesses and 40% from travellers. They do not want to associate themselves too strongly with any one hotel, for fear of losing the recommendation of concierges at other hotels. But being near the hotels and theatre district was very important to Ms. Duke.

16. Ruth's Chris is run independently of the Hilton management, unlike Trader Vic's. Hilton employed the staff at Trader Vic's and the management agreement states that Trader Vic's is managing the restaurant on behalf of the hotel. Ruth's Chris' Toronto manager, Elizabeth Hollyer testified that the restaurant considers the Hilton operation mostly irrelevant to its own. They do not associate themselves with the Hilton in their advertising, except to give the location. Ruth's Chris has its own dedicated entrance outside of the hotel served by an elevator from street level that leads directly to the restaurant. An exterior awning and signage has been designed to make the restaurant look like a "stand-alone" operation.

17. As with Trader Vic's, the presence of the Ruth's Chris restaurant is advertised throughout the hotel and the restaurant is accessible by dialing a four-numeral extension on the telephones in hotel rooms. The same is true for other tenants of the hotel, such as the beauty salon. noting that under the lease, the more money the restaurant makes the more money the hotel makes, counsel for Ruth's Chris did not dispute that hotel staff recommend the restaurant to guests. There is also directional signage in the hotel, paid for half by the restaurant and half by the hotel, as well as posters featuring the "steak shot" on each floor and in the lobby, paid for by the restaurant. There is a button in the hotel elevator indicating "Ruth's Chris Steakhouse - Convention Level".

18. The uncontradicted evidence from Ruth's Chris reservation records indicate 3 to 6 percent of its clientele were guests of the Hilton for the first month of operation, with minimal business from convention guests. Room service is not available from Ruth's Chris and hotel guests may not charge their bills to their room. The restaurant derives business from guests of other hotels, especially those of first class and luxury hotels. As part of its targeting of the business traveller, Ruth's Chris has invited concierges from other hotels to dine at the restaurant, in the hope they will recommend it.

19. The first year of Ruth's Chris business generated gross income of approximately six million dollars whereas Trader Vic's had total revenue of just over one million in its last year of business.

20. The landlord, Westin, owns the hotel parking lot which is operated by Oxford Developments Limited. Ruth's Chris' General Manager negotiated directly with the general Manager of Oxford, with respect to parking arrangements for Ruth's Chris; Hilton was not a party to these negotiations. The

resulting arrangement is that Ruth's Chris provides its customers with free parking from 6:00 p.m. to midnight.

21. The restaurant has ordered incidentals from the hotel, such as name tags. The restaurant also uses the hotel's garbage compactor, for a fee paid to the waste removal company, rather than the hotel. The Hilton gave a discount on rooms to management staff of the restaurant around the time of their opening, and the restaurant gives a discount to Hilton managers. This was seen as a normal part of the landlord and tenant relationship by Ms. Hollyer, the general manager of Ruth's Chris' Toronto.

22. There was considerable evidence about the value of the location in the basement of the Hilton to Ruth's Chris. The Hilton's general manager thought it was ideal. Ruth's Chris designer and general manager thought it was less than ideal because it was not accessible from the street. The designer said it was a destination location for business travellers, meaning they would look for it, rather than go to it because it was where they were. The location is not conducive to "walk-by" exposure, leading Ruth's Chris to spend more on promotion to overcome the disadvantage. Although it is not necessarily the best physical site it was the best financial deal available, and Ms. Duke had looked over the course of two years. There is also confusion among customers about which hotel it really is, because people do not tend to remember that Hilton and Westin switched properties. Additional staff time is required to deal with deliveries because of the basement location. As well being in the hotel requires more and different fire precautions and training for staff.

23. At times, such as when there is a lot of equipment to be moved in for a television interview, the hotel door people have been very helpful personally to the manager of the restaurant and she has responded by inviting them to dinner. When Ms. Duke was in town she would make it her business to introduce herself to everyone in the hotel and talk about the restaurant.

24. One of the issues between the parties was initially whether the hiatus was a deliberate attempt to organize things to avoid the union's obtaining successor rights. There was evidence that Ms. Duke and Mr. Angelkottter discussed the subject of the union's presence in the Hilton and she sought advice on the subject. Ms. Duke testified that unionization is not an issue in New Orleans, and she thought of it as an administrative burden that would make it difficult to run a business. Based on the advice she received, though, she decided to take the risk. In argument, the union did not pursue the theory that the hiatus had been deliberately created.

25. At the close of the responding parties' case, union counsel renewed a request to require the responding parties to produce further evidence pursuant to section 69(13). This was based on the fact that the only witness called by Ruth's Chris, its general manager, had not been hired until after the transaction alleged to be the sale had been concluded. Both responding parties objected based on the idea that the whole transaction was set out in the lease which had been entered on consent, and that the considerations taken into account by Ruth's Chris were not relevant, and that sufficient evidence was before the Board from the hotel's and Ruth's Chris' witnesses as to the nature of the operations. Further, it was argued that where no unfair labour practice was alleged, whether or not the restaurant wished to be union-free was irrelevant. We ruled as follows in material part:

We have heard and considered the parties' submissions on the union's motion under s.69(13). We are of the view that there are likely facts in the knowledge of the responding party Sizzling in Toronto, Inc. (hereafter "Sizzling") material to the allegation that there has been a sale to Sizzling which have not yet been adduced. These would include facts relating to what, from Sizzling's point of view, was included in the price it was willing to pay for the Hilton premises, particularly in the area of good will and relationship with the hotel. Such facts are relevant, in the Board's view, to the Board's need to determine what the substance as well as the form of the transaction were. Therefore,

we direct Sizzling to adduce evidence, pursuant to s. 69(13), of all facts within their knowledge in the areas referred to above.

The Board is not directing what witness Sizzling should produce, but we would underline that it is the best evidence, rather than hearsay evidence, that would be of assistance to the board in its determination. ...

When the hearing reconvened, Ruth's Chris called Lana Duke, the owner of the Toronto franchise, as a witness.

26. Essentially Ruth's Chris takes the position that it has merely expanded its business, and that it derived nothing that could be considered part of a business from either the Hilton or Trader Vic's. It needed space to put its pre-existing business in, and it is leasing that from the Hilton, because of the low rent, but it could just have easily been any other downtown space. There is nothing deriving from the Hilton's business that came with the space, and the basement location is more of a liability than an asset. No goodwill came from Hilton or Trader Vic's; Ruth Chris' has its own, in counsel's submission. Simply put, Ruth's Chris was not looking to buy a business, but to lease space, and the Board should not find otherwise.

27. Further Ruth's Chris takes the position that since there has been no transaction between Hilton and Ruth's Chris, there can be no finding of a sale. Westin is the landlord and Ruth's Chris is the tenant. Hilton Canada Inc. is merely identified as Westin's authorized representative. Hilton is not a party to the lease. However, the lease which is central evidence of the transaction, defines the landlord as including its authorized representatives and Hilton is specifically named as such in the definition section of the lease. We are not of the view that anything turns on the distinction between the Hilton and Westin for the purposes of this decision.

28. In sum, submits counsel, Ruth's Chris got nothing out of the transaction other than the lease. This is an expansion of the Ruth's Chris restaurant chain and Lana Duke's holdings from one to two, rather than a sale of a business from either Hilton or Trader Vic's to Ruth's Chris. Counsel refers to *Sanfords Roadhouse Restaurant*, [1994] OLRB Rep. July 897; *Masters Brew Pub*, [1988] OLRB Rep. Aug. 827; *Calmil Enterprises*, [1980] OLRB Rep. April 401; and *Thunder Bay Golden Nugget Saloon*, [1991] OLRB Rep. July 918 in support.

29. Counsel submits the location itself cannot be a sale, as illustrated by *Sobeys Inc.* 96 CLLC 143, 345 (N.B. Labour and Employment Board).

30. The hotel joins Ruth's Chris in urging a finding that the transaction in question was not a sale of a business, but a landlord and tenant arrangement. Ruth's Chris did not want Hilton's restaurant business, and did not get it in the transaction in the hotel's submission. Many of the things that Trader Vic's had by dint of association with the hotel, such as convention business and room service, Ruth's Chris neither has nor wanted.

31. Counsel for the hotel says that it is interesting to note that Bill 40's section 64.2, now repealed, was the mind set of the union coming into the application and that their case might have been stronger under that section.

32. The union pleaded that there is a tremendous amount of goodwill associated with the upscale dining restaurant located in the Hilton, previously the Trader Vic's and now Ruth's Chris, which was transferred from Trader Vic's to Ruth's Chris by the Hilton. The union pleads that Ruth's Chris services the Hilton's need for upscale dining in the same manner as Trader Vic's did before.

33. At the outset of his argument, union counsel made it clear that it was not their position that Ruth's Chris is relying on the goodwill of Trader Vic's or that they were relying on the location of Hilton as a primary factor. Rather, the union took the position that Ruth's Chris was relying on the location in downtown Toronto as a key asset in the business in two ways. Firstly, Ruth's Chris relies overwhelmingly on business clients and the traveling public. Location is key for that kind of business. Counsel made a twofold argument differentiating the lunch and dinner business. As to the lunch operation, counsel said it is highly analogous to the supermarket line of cases. The success of the business, and just beneath that, the viability of the business, is a function of location and the habit business people have of going to lunch there. The dinner operation uses the location differently because it relies on travelling business people, professionals and upscale travellers. The location being in close proximity to a large number of downtown hotels is responsible for the viability of Ruth's Chris in Toronto.

34. Detailing his argument on the lunch operation, counsel said that the supermarket analogy is apt. In both cases the business is to sell food which is a generic product, whose equivalent can be found elsewhere. Location thus becomes a very large value for supermarkets and for restaurants. Consumers can find food products throughout the city. Convenience, proximity makes location a key factor and often leads to the finding of a sale of a business. This is said to operate in the same way for Ruth's Chris. Counsel points out that Trader Vic's served lunch and had a viable lunchtime operation that attracted working people from the downtown core. Ruth's Chris has picked up on that and services the same market as did Trader Vic's, serving lunch in close proximity to a certain group of workers. Counsel refers to *Dutch Boy Food Markets* 65 C.L.L.C. 775 and *Miracle Food Mart*, [1988] OLRB Rep. July 679 for the general rule and the exception, respectively. In terms of lunch, although Ruth's Chris has changed the operation in a number of superficial ways, the target market, business people wanting to spend between \$10.00 and \$20.00 for lunch, is not different. Counsel asked that we conclude that Ruth's Chris has purchased that aspect of the business that Hilton had for sale. That is how location is extremely significant in the lunch operation in the union's submission.

35. As to the dinner operation, the evidence is clear that Ruth's Chris was targeting the business traveler for dinner. In that respect, counsel argues location is a key asset that Ruth's Chris has bought. Transient populations do not have a habit to analogize to supermarkets. The Board has found that factors to be considered in sale of business cases are different in different sectors. Counsel asked that we look carefully at the location analysis which Ruth's Chris had done before it moved into the Toronto market. They were looking at the direct downtown core specifically in the hotel district because of their aim to reach the business traveller. It is not an accident that Lana Duke decided to locate downtown near the hotels. To the employer's argument that the location is not the business, union counsel says it is generally so, but here location is crucial. Counsel underlined that there were only two locations that met with Lana Duke's serious consideration. Both of them had proximity to the downtown hotels. Counsel argued that location would not always be very relevant as in manufacturing where the product goes to the people or in transportation because it moves around. But here where Ruth's Chris has chosen to target the traveller, proximity is very important. Time is a factor and the traveller may be unwilling to seek out a location because of the lack of familiarity with the town. Answering the hotel's argument that they were just selling space as evidenced by the fact that they considered renting to a mini golf outfit, counsel says that the fact that the location would not have been crucial for such a service does not minimize the fact that it was crucial to the restaurant who finally did move in.

36. Answering the idea that there was no goodwill left from Trader Vic's to be transferred, counsel said that it is irrelevant whether the key item can be associated with the predecessor. Counsel refers to the idea of a nursing home license which is in no way linked to the predecessor, but it is for that sector a part of the business itself. In this type of business, counsel argued that the successor need not take anything from the predecessor. For instance, he said a liquor license runs with the location, not

with the name of the bar. Counsel argued that the geographic location made Trader Vic's and Ruth's Chris viable. But counsel underlined that there is a difference between viability and success. In the end, Trader Vic's was not successful as the mix of factors that add up to success, eluded Trader Vic's. Counsel notes that most businesses are sold because they are unsuccessful, but one can not say that a liquor license transferred from a failing business is worthless. It is a necessary element of viability but does not guarantee success. Similarly, location and proximity to downtown allowed the restaurant business to be viable while success depends on other factors. The location was transferred untarnished and unharmed from Trader Vic's to Ruth's Chris. And what gives the location its value is sold untarnished, for full value. The lease shows that Ruth's Chris bought the exclusive right to operate a steakhouse and the right to non-competition. Counsel refers to *Dutch Boy Food Markets*, cited above, at page 776 for a discussion of such a clause.

37. As to the idea that Ruth's Chris targets a different market, i.e. a more upscale one, this does not make it substantially different under section 69(5). Counsel refers to *Winco Steak n' Burger Restaurants Limited*, [1974] OLRB Rep. Nov. 788 at page 793 on this issue as well as *Horseshoe Tavern*, [1981] OLRB Rep. Sept. 1237, *Vivace Tavern Inc.*, [1982] OLRB REP. Aug. 1224, *Krush*, [1987] OLRB Rep. June 859 and *Colonial Tavern*, [1978] OLRB Rep. Sept. 806.

38. In summation, counsel said that the location equals the business that was purchased and it was at play in two different ways. It operates to Ruth's Chris' advantage in the same way as in the supermarket cases because of proximity and habit for lunch. As to dinner, the location and the proximity to the traveller makes it viable just as it did for Trader Vic's. The intrinsic value of the space was purchased by Ruth's Chris and is part of their business.

39. Referring to *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691, counsel says the Board has considered whether the work is identical or similar and it is in this case.

40. As to the fact that none of the assets of Trader Vic's were sold, counsel says that in the absence of anything else that would be detrimental. However, here where the sale of something very valuable was made, that is not determinative. In this respect, counsel refers to the *Three B's Enterprises Ltd.* B. C. Industrial Relations Council, decision No. C253/89 dated December 6, 1989, about shifting patterns of taste and *Granville Island Hotel and Marina* B. C. Industrial Relations Council, decision No. C258/89, dated December 8, 1989 as to renovations.

41. Addressing the question of hiatus, counsel says that in the middle of a recession the passage of 18 months should not be considered detrimental, referring to *Accommodex Franchise Management Inc.* [1993] OLRB Rep. April 281 for this proposition. In this respect, counsel notes that parts of a business can be sold and the word "as a going concern" is not in section 69.

42. In answer to the Board's questions about the role of location in an expansion scenario, counsel answered that Ms. Duke was at great pains to select the location she did, so it comes down to what weight one gives the location as opposed to the expansion. The existing clientele is highly mobile so location is an even more valuable point. The location is identical whichever of the two properties she considered. It is not the basement of the Hilton that matters; its the fact that it was in downtown Toronto close to the traveling public, submits counsel.

43. In reply, counsel for Hilton said that the supermarket analogy was not apt. Supermarkets draw from within walking distance and the hiatus here would have broken whatever habit remained of going to lunch in that space. Counsel did not find the prices really comparable either. Counsel argued that a supermarket was not as able to completely change its clientele as a restaurant was and submitted that Ruth's Chris, mainly because of its prices, had succeeded in appealing to a different market than Trader Vic's. Another reason the supermarket analogy does not work is because of the number of

restaurants in downtown Toronto in counsel's submission. As to the dinner argument and the broad concept of location, counsel argued that in the tavern cases one is always getting two things, the location and the liquor license. He argues that where it is only space a different conclusion is drawn. Counsel underlined that the location cannot be the business because for instance if a travel agency was followed by a restaurant there is no way that it would be concluded to be a sale of a business. Counsel stressed that what has to be bought and sold is an economic vehicle.

44. In reply, counsel for Ruth's Chris disputed the idea that providing space for the travelling public is part of a business, and argued that is not what the board's jurisprudence stands for. Counsel underlines that Ms. Duke had asked a real estate agent to find space so she could bring the business into Toronto. As to the intrinsic value of the space that counsel says was bought, counsel points out that it was "dirt cheap". Further, counsel says one should find no transfer from Hilton. Hilton was out of that space and so was Trader Vic's and the owner wanted a tenant for the space. Counsel says there is no comparison between the two on the score of food and service.

45. The basic point, in the restaurant's view, is that there was nothing of a business to be transferred from Hilton or Trader Vic's. it had closed and had stopped a long time ago. There was no continuity that transcended the hiatus. Ruth's Chris opened without anything that Trader Vic's had had. A new self-contained business package was inserted into that space. Counsel further underlines that there is no evidence that the restaurant was set up in a way to subvert the act. Counsel for Ruth's Chris accepts the idea that a hiatus is not determinative but submits it is clearly relevant, and in this case quite significant. Counsel argues that the facts in *Accommodex*, cited above, were very different, that the business there took the furniture, fixtures and other things to run the same kind of hotel to attract the same customers as the prior hotel.

46. Distinguishing *Culver House Foods*, cited above, counsel says that the paper transaction there was the only change in the ownership, nothing changed about the business. Counsel maintained that the nature of the work was not the same at all because of the different way of serving food and drink. As to *Three B's Enterprises Ltd.*, cited above, counsel says it is clearly distinguishable, since they bought all the inventory and various other things as detailed in the aspects of the deal. There was a discernible continuity of business which is not present here. What we have here is the demise of one business and the continuation of another business by way of expansion, in counsel's submission.

47. Both responding parties also take the position that Ruth's Chris draws its patrons from the many business executives and professionals who tend to frequent high end restaurants rather than the hotel guests. As it was put in the hotel's pleadings, the fact that Ruth's Chris rents space in the Hilton does not provide it with patrons nor does it provide the Hilton with the food and beverage source for its guests. They both assert that the two markets are different. They both assert that it would have been just as easy for Ruth's Chris to have rented space in any of the commercial towers in the downtown core.

Statutory Provisions

48. This matter was originally filed under the provisions of section 64.2 of Bill 40 but had not come on for a hearing when section 64.2 was repealed by Bill 7. The parties agreed that the matter should proceed only pursuant to Bill 7, section 69 of the current Act, which reads as follows in relevant part:

69. (1) In this section,

“business” includes a part or parts thereof; (“entreprise”)

“sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings. (“vend”, “vendu”, “vente”)

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

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(5) The Board may, upon the application of any person, trade union or council of trade unions concerned, made within 60 days after the successor employer referred to in subsection (2) becomes bound by the collective agreement, or within 60 days after the trade union or council of trade unions has given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

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(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

• • •

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this act.

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

49. Was the lease of the Hilton premises the sale of part of a business within the meaning of section 69? On the evidence, there can be little doubt that Ruth’s Chris was a viable business on its own, and that this was an expansion of a pre-existing business. Thus, more specifically the question to be answered is whether Ruth’s Chris expanded by purchasing part of the Hilton’s restaurant business, or whether it did so by simply acquiring the asset of a favorable lease.

50. Did Hilton sell part of its restaurant business to Ruth’s Chris? the elements of the facts which would support such a conclusion are the following. The Hilton has a multi-faceted business which serves two types of guests - those who rent overnight rooms from it, and those who use its other services, such as meeting rooms, the newsstand and restaurants, but who do not stay overnight. When Trader Vic’s was present in the Hilton premises, one of the ways Hilton did business was to offer its guests, in this larger sense, an additional restaurant choice - that of an american specialty chain, then with a Polynesian menu and theme. By way of the lease to Ruth’s Chris, Hilton is now able to offer the choice of a different American specialty chain - this time an exclusive steakhouse. It was clear from the hilton’s evidence, that this was a valuable acquisition from its point of view, and that Ruth’s Chris is part of what it offers to the public from its premises, from which it profits financially. Hilton no longer manages the specialty restaurant; Ruth’s Chris does that on its own, in a way much different from

Hilton's management agreement with Trader Vic's. But turning over the management of a part of a business to someone else is one way one can sell part of a business under section 69. Alternatively, a factual basis for a finding of a sale of part of a business is the fact that a downtown location was a vital part of Ruth's Chris business, something it purchased from Hilton, as detailed in the union's argument above.

51. The response of the restaurant and the hotel is that the location is an asset, not a part of the business in the sense of section 69, and that only the location changed hands. Put another way, the responding parties see this as a situation where the restaurant and hotel now carry on their separate businesses under the same roof, rather than the hotel having sold part of its restaurant business. Formerly the Hilton co-managed a specialty restaurant with a tenant, now it leases space to a tenant who happens to run a specialty restaurant.

52. The Board has dealt with fact situations which are very similar. in both *Master's Brew Pubs* and *Thunder Bay Golden Nugget Saloon*, cited above, there was a hotel complex where a part of the premises had been used by the hotel for a food and beverage operation. In *Master's Brew Pub*, cited above, the union argued that the hotel had contracted out one of its food and beverage operations into the space left vacant by the closure of a coffee shop. Rejecting the union's argument that what had been transferred was part of the hotel's integrated food service, the Board found there had not been a sale, where the principals of the new brew pub operation were looking for space in which to put their own enterprise. Rather, the board found that there were two separate parallel businesses and there had been no sale. Similarly, in *Thunder Bay Golden Nugget Saloon*, cited above, a pub in a hotel had been experiencing declining business and was converted into storage space until leased for the purpose of expanding a pre-existing business.

53. In each of these cases, the transfer of the location was not considered to be a sale of part of a business, although in each of these cases the same location had previously been used by the hotel to provide food and beverages. This is because it was considered that the successor was a separate parallel business with its roots in its own venture, rather than that of the predecessor. The lease of the space in these cases is seen as the purchase of an idle asset rather than the purchase of part of a business. In *Thunder Bay Golden Nugget Saloon*, cited above, the board relied on the following passage from *Grand Valley Ready Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663:

20. The exercise becomes more complicated where, as in this case, the alleged successor has carried on a parallel business. Where the alleged successor has carried on a parallel business the result of the transaction may as easily be an expansion or alteration of his business as the transfer of the alleged predecessor's business. An employment opportunity which flows from an expansion or alteration of a business carried on by the alleged successor prior to the section 55 [now section 69] transaction does not trigger the operation of the section. The union's bargaining rights attach to the predecessor's business and their preservation is contingent upon a transfer and continuation of that business.

54. In our view, there is no meaningful distinction between the facts of this case, and the two cases discussed above. However, in neither of the above-noted cases did the Board hear an argument framed the way the location argument was made before us. Thus, it is appropriate to consider whether the argument provides sufficient reason to come to a different conclusion, despite the lack of significant distinguishing circumstances.

55. As well, the Board's analysis as to whether a sufficient "part" of a business has been transferred to warrant a finding of a sale has developed since the time those cases were decided. See cases such as *Accommodex Franchise Management Inc.*, cited above, and *Parnell Foods*, [1992] OLRB Rep. Dec. 1164, and the cases cited therein. in *Parnell Foods*, the Board found a sale of part of a business where a correctional institution "contracted in" a food service business to operate a coherent

portion of its institutional business. The fact that Parnell was a pre-existing food business did not mean that there was no sale, where Parnell acquired what the board found to be “virtually all of the organizational capacity to provide the food services ... much more than a venue”. Although Parnell arose under the *Crown Transfer Act*, the analysis is also applicable under section 69 of the *Labour Relations Act*, since the purpose of the statutory provisions is the same: to avoid the disruption of bargaining rights where the ownership of the business or part thereof changes. See also the Supreme Court of Canada’s decision in *Syndicat national des employés de la Commission scolaire régionale de l’outaouais (CSN) v. Union des employés de service local 298 (FTO), Bibeault et al.*, [1988] 2 SCR 1048.

56. The union’s location argument is based on an analogy to the board’s supermarket jurisprudence. See for example *Dutch Boy Food Markets*, cited above. In such supermarket cases, location has taken on added significance, based on the concept of goodwill deriving from the habit of people shopping at a particular location. Here we are asked to analogize to the habit of businesspeople eating out in the downtown area, or the effect of proximity to the travelling public who find themselves in a certain area of the city, and are unfamiliar with the rest of the city. The idea is that the downtown location is an essential part of Ruth Chris’s viability, and therefore is part of the business.

57. There can be no doubt that an appropriate location is essential to the viability of a restaurant such as Ruth’s Chris. And the board’s jurisprudence demonstrates that an asset, or a key employee, can be so important to a business that it takes on the aspect of a severable part of the economic vehicle. In such cases, the asset or assets (such as the location or the liquor license or the two together) create goodwill, or some intangible that take the asset out of the plane of the inanimate or idle, and into the domain of a part of a business. The union points here to the studies done for Ruth’s Chris which indicated the best business strategy was to open in the central area near the main business generators - hotels, theater, shopping, offices and sporting events. As union counsel says, it should not then be considered a coincidence that the restaurant ends up in a hotel like the Hilton - and that the location should be considered sufficiently key to be considered part of the business.

58. Accepting, without so finding, for the purpose of argument, that restaurant location is sufficiently analogous to supermarket location, there is a more basic difficulty with the union’s argument. If it is part of the Hilton’s business that has been sold, it has to be the Hilton location that has the intangible, the good will, associated with it. The burden of the union’s argument is that it is not the Hilton location in particular, but the fact that the Hilton location is a downtown location which engenders this goodwill. In our view, this analysis takes the idea of location as part of a business beyond the point where it is identifiably connected with the specific business of the Hilton, and associates it instead with the ensemble of business activity in the downtown area. In our view, this is a point beyond the limits of the meaning of the section in that, whatever the part of the business, it must be able to be traced specifically to the predecessor business - rather than to any of many similarly located businesses.

59. We note as well, that the supermarket cases are not universal in finding that the location is part of the business. There are a number of cases including a pre-existing parallel business in the same supermarket where a sale has not been found. See for example *New Dominion Stores*, [1989] OLRB Rep. May 473 and *Miracle Food Mart*, [1988] OLRB Rep. July 679.

60. Here the evidence is clear that only the location was transferred. The total asset configuration did not change hands, nor any sufficiently significant part thereof, as in *Accommodex Franchise Management Inc.*, [1993] OLRB Rep. April 281 where a hotel was purchased after a significant hiatus and a sale was found. Nor did any managerial or other expertise, or any other part of Hilton’s or Trader Vic’s business pass to Ruth’s Chris. The evidence about the small amount of traffic from the Hilton and the differences in revenue indicate that the business being operated is Ruth’s Chris rather than a part of the Hilton’s. We put no importance on the oven venting and built in refrigerators, as they were both part

of the building and incidental to the business. As well, we do not view factors such as the advertising and use of the garbage compactor as elements which bespeak the sale of a business any more than a landlord and tenant relationship.

61. The fundamental question is whether the location alone is a sufficiently coherent and severable “part” of the Hilton’s business, in the sense of its economic organization, to trigger a sale of a business. In the end, having carefully considered the arguments made, as well as the newer caselaw, we are not persuaded that it is. These facts are quite different from *Parnell Foods*, for example. Here the organizational capacity to operate the restaurant came not from the Hilton, but from the pre-existing business. What Hilton provided was the venue. The appropriate view of the facts, in light of the Board’s previous jurisprudence, is that Hilton carried on a restaurant business with Trader Vic’s, which it ceased in 1993. During that time it used the basement premises as an asset in that part of its business. When Trader Vic’s closed, the premises became an asset in Hilton’s leasing portfolio. Ruth’s Chris then rented that space as an asset to continue and expand its business, rather than purchasing part of the Hilton’s restaurant business.

62. It is appropriate to note in closing that the hiatus in operations is not of significance in the above finding. We adopt the analysis of the board in *Accommodex Franchise Management Inc.*, cited above as to hiatus at para. 75.

63. As well it is appropriate to address the fact that much of the hearing was taken up with attempts to show that Ruth’s Chris was more upscale than both Trader Vic’s and the Hilton. This was done with evidence for example that the “product”, the steak, was unlike anything Trader Vic’s had to offer and that the restaurant targets a narrower band of elite customers. In our view little turns on the distinction between the types of food or these differences in the market served. The hotel operates as a first class hotel, as set out in the lease. Both restaurants were specialized, and not inexpensive. The fact that the prices at Ruth’s Chris are higher, even a lot higher, is not something that changes the legal effect of the facts. It is certainly not sufficient to constitute a substantial change in character pursuant to section 69(5) had we found a sale to have occurred. Although we accept that Ruth’s Chris is targeting the truly affluent, little turns on this. See *Colonial Tavern*, [1978] OLRB Rep. Sept. 806.

64. For the above reasons, the application is dismissed.

0171-97-R; 1838-96-FC David Pentland, Applicant v. Labourers’ International Union of North America, Local 1059 Affiliated with A.F. of L. - C.I.O. - C.L.C., O.F.L., Responding Party v. **Ingersoll Plastics Inc.**, Intervenor; Labourers’ International Union of North America, Local 1059, Applicant v. Ingersoll Plastics Inc., Responding Party

First Contract Arbitration - Practice and Procedure - Representation Vote - Termination - Parties agreeing to adjourn first contract application sine die before any hearing - Five months later, union asking for application to be listed for hearing - Employees filing termination application one month after union’s request and three weeks before first contract application scheduled to be heard - Board not ordering representation vote and deferring consideration of termination application until first contract application decided

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *S. C. Laing* and *D. A. Patterson*.

DECISION OF VICE-CHAIR LAURA TRACHUK AND BOARD MEMBER D. A. PATTERSON; June 25, 1997

1. Board File No. 1838-96-FC is an application that a first contract be settled by arbitration. Board File No. 0171-97-R is an application for termination of bargaining rights. In a decision dated May 1, 1997 the Board directed the parties to file submissions on the following two questions: “(1) in what order the Board ought to hear and decide the two applications; and (2) having regard to this determination, whether and if so, when, a vote on the termination application, ought to be held (and [presumably] whether or not the ballot box ought to be sealed)”. Mr. Pentland and Ingersoll Plastics Limited (referred to as the “company”) both submitted that the termination application should be considered first and that if the employees indicated they no longer wished to be represented by the trade union the first contract application should be dismissed. The applicant in File No. 1838-96-FC (referred to as the union) submitted that that application should be considered first. None of the parties requested that a representation vote be held even if the Board decided to consider the first contract application first.

2. In a decision dated May 8, 1997 the majority (Board Member Laing dissenting) held that Board File No. 0171-97-R will not be considered, and a representation vote will not be held, until the application in Board File No. 1838-96-FC has been decided. The following are the reasons for that decision.

3. The relevant provisions of the *Labour Relations Act* provide as follows:

43. (1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within 30 days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 17 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

3) Where a direction is given under subsection (2), the first collective agreement between the parties shall be settled by a board of arbitration unless within seven days of the giving of the direction the parties notify the Board that they have agreed that the Board arbitrate the settlement.

4) Where the parties give notice to the Board of their agreement that the Board arbitrate the settlement of the first collective agreement, the Board,

- (a) shall appoint a date for and commence a hearing within 21 days of the giving of the notice to the Board; and
- (b) shall determine all matters in dispute and release its decision within 45 days of the commencement of the hearing.

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(11) The date of the first hearing of a board of arbitration appointed under this section shall not be later than 21 days after the appointment of the chair.

(12) A board of arbitration appointed under this section shall determine all matters in dispute and release its decision within 45 days of the commencement of its hearing of the matter.

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(23) Despite subsection (2), where an application under subsection (1) has been filed with the Board and a final decision on the application has not been issued by it and there has also been filed with the Board, either or both,

- (a) an application for a declaration that the trade union no longer represents the employees in the bargaining unit; and
- (b) an application for certification by another trade union as bargaining agent for employees in the bargaining unit,

the Board shall consider the applications in the order that it considers appropriate and if it grants one of the applications, it shall dismiss any other application described in this section that remains unconsidered.

(24) An application for a declaration that a trade union no longer represents the employees in the bargaining unit filed with the Board after the Board has given a direction under subsection (2) is of no effect unless it is brought after the first collective agreement is settled and unless it is brought in accordance with subsection 63(2).

(25) An application for certification by another trade union as bargaining agent for employees in the bargaining unit filed with the Board after the Board has given a direction under subsection (2) is of no effect unless it is brought after the first collective agreement is settled and unless it is brought in accordance with subsections 7(4), (5) and (6).

* * *

63. (1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 67, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

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(3) The applicant shall deliver a copy of the application to the employer and the trade union by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board.

(4) The application filed with the Board shall be accompanied by a list of the names of the employees in the bargaining unit who have expressed a wish not to be represented by the trade union and evidence of the wishes of those employees, but the applicant shall not give this information to the employer or trade union.

(5) If the Board determines that 40 per cent or more of the employees in the bargaining unit appear to have expressed a wish not to be represented by the trade union at the time the application was filed, the Board shall direct that a representation vote be taken among the employees in the bargaining unit.

(6) The number of employees in the bargaining unit who appear to have expressed a wish not to be represented by the trade union shall be determined with reference only to the information provided in the application and the accompanying information provided under subsection (4).

(7) The Board may consider such information as it considers appropriate to determine the number of employees in the bargaining unit.

(8) The Board shall not hold a hearing when making a decision under subsection (5).

(9) Unless the Board directs otherwise, the representation vote shall be held within five days (excluding Saturdays, Sundays and holidays) after the day on which the application is filed with the Board.

4. Therefore the Act contemplates that a party involved in bargaining a first collective agreement may apply to the Board for a direction that the agreement be settled by arbitration if the process of collective bargaining has been unsuccessful for one of the reasons listed in section 43(2). The Act contemplates that such an application will be dealt with swiftly, and that if the Board directs the settlement of a first contract by arbitration any application for termination of bargaining rights or for displacement by another bargaining agent is of no force and effect. However, the Act also contemplates in section 63 that if a trade union does not make a collective agreement with the employer within one year after certification an employee may apply to the Board for a declaration that the trade union no longer holds bargaining rights. A representation vote is to be held within five days of receiving such an application unless the Board directs otherwise. Section 43(23) leaves it to the Board's discretion as to which application it will consider first when faced with applications under both sections. The Board must decide which application to consider first and if it grants one, the other application shall be dismissed.

5. How should the Board's discretion under section 43(23) be exercised in the circumstances of this case? The union was certified on April 10, 1996. The first contract application was filed on September 25, 1996 and a hearing was scheduled to commence within 30 days as directed by the statute. The parties agreed to adjourn the application *sine die* prior to the hearing. It appears from the subsequent pleadings that the parties' intention was to continue to attempt to reach a collective agreement through collective bargaining. On March 4, 1997 the union requested that a hearing of the application be scheduled. The union also filed amended particulars which refer to events occurring subsequent to the filing of the application. As the original hearing dates had been adjourned by the parties the Board did not consider that it was required to schedule a hearing within 30 days and scheduled a hearing for April 30, May 1 and 2. The application for termination of bargaining rights was filed on April 14, 1997. In a decision dated April 18, 1997 the Board ordered that the two applications be heard together starting April 30 for the purposes of determining how the two applications would be dealt with. However, the hearing dates of April 30 and May 1 and 2 were adjourned because counsel for the company was not available and because Mr. Pentland and his counsel had received insufficient notice of the hearing and were also unavailable.

6. The union acted expeditiously in filing its first contract application and could reasonably have expected to have had it determined, or at least to have commenced a hearing, before an application for termination of bargaining rights would be timely. It appears from the correspondence that the union may not have been aware that it was giving up its right to have the matter heard within 30 days when it agreed to adjourn the original hearing dates *sine die*. It did ask to have the matter brought back on in a timely manner. The Act contemplates that one of the applications in such circumstances will be considered before the other. In the normal course, applications with competing claims are determined in the order in which they are filed. In these circumstances there is no reason to depart from that normal expectation, indeed to do so would be prejudicial to the union which has made its claim to have a direction that a first contract be settled by arbitration in a timely way. Furthermore, if the application for first contract is successful, it is exactly because the statutory requirements under section 43(2) have been met. If those requirements have been met, they have also given rise to the circumstances which make the termination application timely. It is therefore most appropriate for the Board to consider the application that a first contract be settled by arbitration before the termination application.

7. In prior decisions the Board's approach has been to consider the first contract application first when the hearing has commenced prior to the filing of the termination application. In *Fort William Clinic*, [1996] OLRB Rep. Nov./Dec. 942, the Board had commenced the hearing of the first contract application when the application for termination of bargaining rights was filed and ruled that it would not consider the latter application until the former had been determined. The Board also declined to order a representation vote or to decide whether a hearing should be held on the basis of the union's allegation of wrongdoing prior to holding a vote. The Board in that decision also noted that section 43(23) is almost identical to section 40a(22) as it read in the Act prior to 1993. Under that section the Board took the same approach. In *Northfield Metal Products Ltd.*, [1990] OLRB Rep. March 302, the Board decided to consider an application for first contract before an application for termination of bargaining rights when the application for first contract had been filed first, even though the parties there, as here, had agreed to adjourn the early hearing dates *sine die*. (See also *Co-Fo Concrete Forming Construction Limited*, [1987] OLRB Rep. June 828 and *Venture Industries Canada Ltd.*, [1990] OLRB Rep. May 625.)

8. In other circumstances where a union is objecting to the termination application under the present section 63(16), or under the Board's previous jurisdiction with respect to petitions and it therefore appeared that the same evidence would have to be called in both the first contract and the termination application the Board has sometimes heard both applications together and then decided which one to consider first. If it decides that a direction to settle a first contract by arbitration should be ordered, it dismisses the termination application. (See *Knob Hill Farms Limited*, [1991] OLRB Rep. April 521.)

9. In the majority's view, this is more like the cases in which the first contract hearing has already commenced when the termination of bargaining rights application is received. In this case the union is not objecting to the application for termination of bargaining rights under section 63(16), so there is no possibility that the same evidence might have to be heard twice. On the other hand, this first contract application was received long before the termination application and the parties could reasonably have expected that the hearing would have been decided or at least commenced, given the emphasis in the Act on expedition in these cases. Although the parties had not yet spent the resources involved in calling witnesses to testify they are expecting a resolution of the first contract application. It makes good labour relations sense in these circumstances to consider the first contract application before the application for termination of bargaining rights.

10. As noted above, none of the parties requested that a representation vote be held even if the Board decided to consider the first contract application first and no submissions were made with respect to that issue.

11. For all of the above reasons, the majority directed that the first contract application in Board File No. 1838-96-FC be considered before the application for termination of bargaining rights in Board File No. 0171-97-R and that no representation vote should be held at this time.

DECISION OF BOARD MEMBER S. C. LAING; June 25, 1997

1. While the Board is charged with determining (under section 43(23)) which application it will consider first in these circumstances, it is by no means precluded from taking steps to ensure that its determination does not interfere with, or is not at the expense of, other rights which are of equal import - the right to bring an application for a declaration that the trade union no longer represents the employees in the bargaining unit.

2. In the situation before the Board, while I acknowledge that the first contract application predates the termination application, I do not agree that it in essence disposes of the timely termination application. Accordingly, I would find it appropriate to order the holding of a representation vote and seal the ballot box pending a determination of the first contract application.

3791-95-R Marriott Corporation of Canada Ltd. (at Carleton University), Applicant
v. Canadian Union of Public Employees and its Local 2451, Responding Party

Bargaining Units - Combination of Bargaining Units - Employer applying under Bill 7 transitional provisions to “de-combine” bargaining unit of full-time and part-time employees - Board finding that Bill 7’s reference to “community of interest” is meant to invoke Board’s traditional approach to the concept and not its more modern version as expressed in *Hospital for Sick Children* case - Board applying traditional approach and finding that existing bargaining unit not appropriate

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *J. A. Rundle* and *D. A. Patterson*.

APPEARANCES: *P. M. Rusak*, *Joe Boregisi*, *Frank Gillett* and *John Babiak* for the applicant; *Sean McGee*, *Andy Mele*, *Larry Wong* and *Alain Belanger* for the responding party.

DECISION OF RUSSELL G. GOODFELLOW, VICE-CHAIR, AND BOARD MEMBER J. A. RUNDLE; May 1, 1997

1. This application is made pursuant to section 5(2) of the transitional provisions of the *Labour Relations Act, 1995*. Section 5 states in its entirety:

5. (1) This section applies with respect to bargaining units that include both full-time and part-time employees on the day this section comes into force but did not include both full-time and part-time employees before January 1, 1993.

(2) The employer or the trade union that represents the employees in the bargaining unit may apply to the Ontario Labour Relations Board within 90 days after this section comes into force for a declaration that the bargaining unit is not appropriate for collective bargaining.

(3) The Board shall issue the declaration unless the Board is satisfied that the existing bargaining unit is appropriate because a community of interest exists between the full-time and the part-time employees.

(4) The following occurs upon the issuance of a declaration:

1. The bargaining unit is divided into two bargaining units, one composed of full-time employees and one composed of part-time employees.
2. Subject to subsection (6), the trade union continues to represent the employees in each of the bargaining units.
3. Subject to subsection (6), the collective agreement, if any, continues to apply to the employees in each bargaining unit. There shall be deemed to be two collective agreements, one for each bargaining unit.

(5) Subject to subsection (6), upon issuing a declaration the Board shall certify the trade union as the bargaining agent for each of the bargaining units if there is no collective agreement in force.

(6) When issuing a declaration, the Board may make such orders as it considers appropriate in the circumstances, including orders relating to the collective agreement if any.

2. The unit in question was created by a decision of the Board dated August 19, 1994. That decision was made pursuant to section 7 of Bill 40. The decision combined two pre-existing bargaining units into one. The pre-existing bargaining units were an exclusively full-time and an exclusively part-time unit. The present application was filed on January 30, 1996. That date was within 90 days of the coming into force of section 5. Accordingly, the requirements of sections 5(1) and (2) are met. That leaves the language of section 5(3).

3. Section 5(3) requires the Board to issue the declaration referred to in section 5(2) (i.e. “that the bargaining unit is not appropriate for collective bargaining”) *unless* the Board is satisfied that “the existing bargaining unit is appropriate because a community of interest exists between the full-time and the part-time employees”. The onus of proof, therefore, is on the union.

4. The parties directed their evidence and submissions towards two issues: the existence of a community of interest between the full-time and part-time employees and whether the inclusion of both types of employees in a single bargaining unit had created or would be likely to create serious labour relations problems. At the risk of over-simplifying the parties’ positions, the employer argued that there was no community of interest between the two groups and, in the event that it was relevant, their inclusion in a single bargaining unit had created and would be likely to continue to create serious labour relations problems. The union argued, on the other hand, that there was a sufficient community of interest between the two types of employees and that the combined bargaining structure had not generated and would not be likely to generate any serious labour relations problems.

5. In the Board’s view, the fundamental question to be decided is the meaning to be given to section 5(3). Specifically, is the reference to “a community of interest” meant to invoke the Board’s traditional approach to this concept or its more modern version as expressed, for example, in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266. The difference is significant. Prior to “*Sick Kids*” the Board would determine the appropriateness of a proposed bargaining unit, in part, with reference to the existence of what it described as a “community of interest” between the employees. At that time, and prior to Bill 7, those words did not appear in the statute and the Board was not expressly required to give content to them. Whether a community of interest existed depended upon the application of a variety of factors and presumptions. In the case of full-time and part-time employees, the Board presumed disparate collective bargaining interests and routinely placed such employees in different bargaining units at the behest of either party. However, 30 years of collective bargaining experience, changing patterns of work and organizing, and a deepening labour relations wisdom changed all of that. In *Sick Kids* the Board re-examined its approach to the determination of appropriate bargaining units and, in the process, assigned a new role and standard to the concept of community of interest. In what has become the critical passage of that decision, the Board stated:

23. We might make an additional but related observation. We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer...

6. As a result of this and subsequent decisions the Board has shifted the focus of its analysis from “community of interest” to the more functional “serious labour relations problems”. The evolution in the Board’s thinking was captured in *Burns International Security Services Limited*, [1994] OLRB Rep. April 347. After setting out the foregoing passage from *Sick Kids*, the Board stated:

27. ... If the unit applied for meets that simple test, it serves no purpose to litigate alternative bargaining unit configurations, nor does the term “community of interest” usually provide much guidance to what is an appropriate bargaining unit. All employees share a “community of interest” by virtue of working for the same employer, and “real life collective bargaining” seems to be able to accommodate groups with quite different duties and conditions, who one might still argue had a separate “community of interest”.

28. Both in *Hospital for Sick Children* and in later cases, the Board has explored the tension between bargaining structures that facilitate organizing (one of the goals of the statute), and bargaining structures that are likely to be more stable and effective in the long-run (another goal of the Act). The former objective points to smaller employee groupings which are more readily organized. The latter goal points to broader-based bargaining units that have the organizational mass and bargaining power to survive over time and in changing market conditions.

29. These goals must be harmonized within a framework that now recognizes (as early Board “policies” might not) that there is no single unique and indisputably “appropriate” unit. There are degrees of appropriateness; or to put the matter another way, sensible, alternative ways in which one can define the bargaining unit without triggering (as the Board in *Hospital for Sick Children* put it) “serious labour relations problems”. A trade union need not seek to represent the *most* comprehensive or *most appropriate* bargaining unit; and as the applicant or moving party, the union has a degree of flexibility in deciding what unit to organize. As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit that it applies for. The focus is on concrete problems rather than the sometimes nebulous concept of “community of interest”. ...

7. Similar sentiments were expressed subsequently in *Active Mold Plastic Products Ltd.*, [1994] OLRB Rep. June 617, where the Board stated:

29. Most recently, in *Burns International Security Services Limited* (unreported, April 7, 1994, Board File 3340-93-R), the Board addressed the utility of the concept of “community of interest”. In this decision, it was noted that the term “community of interest” does not usually provide the Board with much assistance in determining whether an applied for bargaining unit is appropriate. It was observed in this decision that the focus before the Board in bargaining unit determination cases should be upon “concrete problems rather than the sometimes nebulous concept of “community of interest””. ...

30. This panel of the Board agrees with the approach to the concept of “community of interest” which is reflected by the decision of *Burns International Security Services Limited*, described above. In the case before us, we found the numerous references to “community of interest” to be unhelpful. As noted by the Board in *Burns International Security Services Limited*, all employees share a “community of interest” by virtue of working for the same employer. In point of fact, there are numerous “communities of interest” that can be identified in any particular workplace. It is not necessary nor is it desirable for the Board to assess the relative strengths of the varied “communities of interest” in the workplace, just as it is unnecessary for the Board to consider alternative bargaining unit descriptions in the absence of serious labour relations problems. At the end of the day, the Board’s focus should be upon the concrete, demonstrable problems which will result from the applicant’s proposed bargaining unit should it be granted by the Board. In the absence of such concrete, demonstrable problems, the applicant’s proposed bargaining unit will be acceptable to the Board.

8. It will be apparent from this brief review of the Board’s recent case law that the concept of “community of interest” no longer plays a significant role in the determination of appropriate bargaining units in applications for certification, and the union urged us to take a similar approach here. CUPE suggested that we apply the “*Sick Kids* analysis” and focus our attention on the presence of a sufficient community of interest among the full-time and part-time employees and the absence of any concrete, demonstrable, serious labour relations problems flowing from their inclusion in a single bargaining unit.

9. It is tempting for the Board to presume that the reference to “community of interest” in section 5(3) was intended to incorporate the meaning the Board has recently given to that concept. We might then be prepared to find that the union’s evidence of: a single employer; an overlap in certain job functions, classifications, hours of work and supervision; and a union executive drawn from the ranks of both types of employees, satisfies that test. However, we do not believe that that was the Legislature’s intention.

10. First, and perhaps most obviously, section 5(3) does not reproduce the “*Sick Kids* test” nor does it make any reference to “serious labour relations problems”. That part of the *Sick Kids* analysis is noticeably absent, and we do not think it can be inferred from the reference to community of interest. “Community of interest” and “serious labour relations problems” are different, albeit related, concepts. “Serious labour relations problems” are, among other things, the filter through which an allegedly deficient “community of interest” must pass. Second, the Board has said that most, if not all, employee groupings share “a community of interest” by virtue of working for the same employer and that many “communities of interest” can be located within a given workplace. Were we to take this approach to the requirements of section 5(3), it is plain that all, or virtually all, such applications would be doomed to failure. In our view, that cannot have been the Legislature’s intention. A more satisfactory approach, from a statutory interpretation point of view, is to assume that the Legislature intended its words to have some meaning. That meaning can be found in the more “traditional” approach to the concept of community of interest expressed in such cases as *Board of Education for the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713; *Toronto Airport Hilton*, [1980] OLRB Rep. Sept. 1330, and *Leon’s Furniture Limited*, [1976] OLRB Rep. May 232.

11. In the present case, the evidence indicates that we are dealing with a very “traditional” type of part-time workforce. The overwhelming majority of the part-time employees in the applicant’s university food services business are students. Many of these are in the country on visas. Approximately 60 percent of the part-time employees leave the applicant’s employ annually. For the most part (although not exclusively), the part-time employees work in the lower skilled, lesser paying jobs requiring little or no training. Their hours of work tend to be fewer than 16 in a week and are meant to accommodate their other activities, such as attending classes and studying. Each year, a managerial employee, known as a “student manager”, is solely responsible for the hiring and orientation of part-time employees and supervises the front service area where most of the part-time employees work.

12. While the continuing validity of traditional assumptions about the attachment of part-time employees to the workplace is questionable, the part-time employees in this particular workplace display many of the attributes associated with the traditional view. For example, the historical assumption that part-time employees have little or no attachment to the workplace and, therefore, little or no interest in long-term terms and conditions of employment may be seen to be supported here by the fact that after 11 years of collective bargaining the part-time employees have not negotiated any “welfare benefits” (i.e. life insurance, A. D. and D., OHIP coverage, vision care, drug care and dental plan). These benefits are, however, part of the full-time employees’ terms and conditions of employment. Moreover, after two combined agreements (albeit one of which was really just an extension of the expiry date of the full-time agreement), there continues to be a vast number of differences in the terms and conditions of employment applicable to the two types of employees. Employer counsel pointed to approximately 21 such differences in the collective agreement, including the maintenance of separate seniority lists, different scheduling provisions, different holidays, different vacation and vacation pay, and different wage schedules. While some of these variations may be attributable to different bargaining dynamics under the former collective bargaining structure, the sheer magnitude of the differences supports the inference that the two types of employees do not share the kind of “community of interest” required by section 5(3).

13. In our view, this is the point at which our inquiry must end. The statute neither requires nor entitles us to ask whether the full-time and part-time employees share “a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer”. That issue is not before us. Rather, as indicated, the issue is whether they share “a community of interest”. We have found that they do not. If this outcome raises the possibility that a part-time/full-time bargaining unit that may have been found to be “appropriate” in the context of an application for certification may be de-combined under section 5 of the transitional provisions, so be it. The Board is required to apply the language that it is given. Indeed, the possibility of just such a result was noted by the Board in *Caressant Care Nursing Home of Canada Limited*, [1996] OLRB Rep. Oct. 748, where the Board stated:

42. ... While, as will become evident, it makes no difference to the result in this case, we cannot accept the union's invitation that we treat the issue before us simply as the same determination that might be made should the bargaining unit(s) in question be the subject of a certification application. And while there must be some concern about the (at least theoretical) possibility that in an application under section 5(2) of Bill 7 the Board might divide (or affirm) a bargaining unit that it would otherwise consider to be appropriate (or not) in a certification context, we feel compelled, in the context of the time-limited transitional applications which may be brought under the section, to frame our inquiry in the fashion the Legislature has directed.

14. The thrust of the Board's decision in *Caressant Care*, *supra*, was that customary assumptions about combined part-time/full-time bargaining units are no longer applicable in the modern workplace. Traditional part-time units - in which employees routinely come and go and exhibit relatively little long-term attachment to their jobs - are no longer the norm and, accordingly, presumptions about disparate collective bargaining interests no longer apply. *Caressant Care* says, in effect, that “all bets are off” and the Board can be expected to apply the more functional *Sick Kids* analysis when assessing the appropriateness of full-time/part-time bargaining units in future applications for certification. While we see no reason to depart from that approach, this is not an application for certification and this is not the kind of part-time workforce that was dealt with in *Caressant Care*. This is an application to “de-combine” a full-time bargaining unit from a very traditional type of part-time bargaining unit in which the union is required to establish that “a community of interest” exists among the full-time and part-time employees. On the facts before us, that requirement has not been satisfied.

16. In the result, and having regard to the provisions of section 5(3), the Board hereby declares that the existing bargaining unit is not appropriate because a community of interest does not exist between the full-time and the part-time employees. The Board will remain seized, pursuant to section 5(6), to make such further orders as may be necessary to give effect to this direction.

CONCURRING OPINION OF J.A. RUNDLE; May 1, 1997

1. While I concur with the final disposition of this matter, I have some comments with respect to the concept of “community of interest” and its application by the Board.

2. One must not forget that the test enunciated in the *Hospital for Sick Children* [1985] OLRB Rep. Feb. 266 is a two-fold test. The first element of the test being:

“does the unit which the union seeks to represent encompass a group of employees with a sufficiently *coherent community of interest* that they can bargain together on a viable basis”.

[emphasis added]

followed by the second element:

“without at the same time causing serious labour relations problems for the employer ...”

I would note that the community of interest element was always part of the *Hospital for Sick Children* test. It was only during the Bill 40 era that this element of the test was negated by the Board.

3. In structuring the transitional provisions the Legislature, in Bill 7, is clearly sending a message that “community of interest” is a principal consideration in determining the appropriateness of separate or combined full-time/part-time bargaining units. It behooves the Board to heed this message.

DECISION OF OF BOARD MEMBER, D.A. PATTERSON; May 1, 1997

1. I dissent from the majority decision of the Board.

2. I would have come to a different conclusion on this application for de-combination. I would have based my decision in this matter on two factors. These two factors are the community of interest of the effected employees and the existence of serious labour relations problems created by the combination of existing bargaining unit.

3. I am convinced by the evidence heard and the filings of the applicant and the respondent that there still remains a sufficient community of interest between the existing employees in the combined bargaining unit as determined by the Board August 19, 1994, under the existing law at that time. Section 7 of the then Bill 40 gave the Board discretion under that section to combine existing full-time and part-time bargaining units into one unit for the purpose of collective bargaining. This application was made under the new law, Bill 7, which gave an applicant the right to make application under Section 5(3) to de-combine such configured units provided it was applied for within the 90 day period immediately following the passage of Bill 7. I am not convinced based on what I heard or read is enough to reverse the Board’s original decision. The Board was not presented with enough evidence to show that there is no community of interest amongst the employees nor were there any serious labour relations problems put before the Board that would compel the Board to reverse its decision of ’94. The evidence and assertions of the applicant in the instant case did not show that there was no community of interest between those employees in the bargaining unit since the combination nor did the applicant point to any serious labour relations problems since the combination.

4. I would hold that the same community of interest exists now as it did at the time of the application for combination back in ’94. The same would hold true for the question of serious labour relations problems or the lack thereof, since I would maintain that what existed prior to the combination exists now and the applicant was not able to show how these administrative inconveniences were such to constitute a serious labour relations problem.

5. In the instant case the Board is not confronted with a small struggling employer who provides a food service in a campus environment. The Marriott Corporation has operated in Canada for 30 years, as a matter of fact Marriott’s first food service contract started at Carleton University. In 1994, Marriott made \$56 million in profit in its Canadian ventures. It employs 5,000 people here in Canada and 180,000 workers worldwide. The applicant’s corporate history and background hardly fit the profile of a small entrepreneur food service provider. From its humble beginnings in Washington D.C. in 1927, Marriott now has a presence in 25 countries and holds in excess of 4,200 contracts worldwide. Surely, the expertise Marriott has developed over the years as a sophisticated corporate entity in terms of its dealings with its employees has arrived at the point where the issues raised by the applicant cannot amount to any real serious labour relations problems. I would not dispute that the assertions raised may be of some administrative inconvenience but certainly not of the magnitude that would cause it any great hardship from the point of view of how it deals with this small group of employees. I also did not hear of any labour relations problems arising from the combination of the bargaining unit. Also the Board heard no assertion from the applicant that if the Board were to grant the application that these

assertions would go away or disappear. Specially, counsel for the applicant drew the Board's attention to 21 different administrative differences which she aptly described as to why the two groups of employees do not share a community of interest. Despite the persuasive nature of counsel for the applicant, I am not convinced to agree with counsel that the community of interest between the two groups is any less now than it was when the units were combined. The assertions outlined are not insurmountable nor do they constitute any change from what existed prior to this application.

6. I would also hold that the Board in the exercise of its discretion take into account the common sense principles of collective bargaining and labour relations, and on balance, before the Board should exercise that discretion it should hear some hard evidence of serious labour relations problems which commenced or were initiated during the time of the combination of the previous bargaining units. The Board should not be a party to the dismantling of the collective bargaining process unless we hear the kinds of arguments which lend themselves to making the process work that much more smoothly. One of the Board's founding principles is to regulate the affairs between employers and employees in a harmonious relationship in an environment conducive to good labour relations.

7. The community of interest between the employees of the bargaining unit is no less now than it was prior to the combination. The most compelling factor for the community of interest between these employees is their employer, this is the common thread which weaves the employees together. If any detrimental side effect can be anticipated I believe it could come in the form of representation within the units proposed by the applicant. To date the respondent has serviced its members satisfactorily, by the sheer absence of any intervention filed by employees it would seem that the bargaining unit employees have chosen their union representation from the ranks of the bargaining unit, there have been no filings to indicate that the employees are not feeling represented fairly or adequately in their dealings with the employer.

8. In conclusion, I would not have exercised the Board's discretion and ordered the de-combination application under Section 5(3) of the Act.

0247-97-M; 0248-97-U Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America and Local 1688 The Ontario Taxi Union, Applicant v. **Metro Cab Company Limited** and Metro Cabs Associates' Committee Representing Associates of Metro Cab Company Limited, Responding Parties

Duty to Bargain in Good Faith - Interim Relief - Remedies - Unfair Labour Practice - Union alleging that employer's failure to provide certain financial and other information violating duty to bargain - Board making interim order under section 98 of the Act directing production of information and setting out mechanism for its collection

BEFORE: *K. G. O'Neil*, Vice-Chair.

APPEARANCES: *James Hayes, Jeff Andrew and Guy Havell* for the applicant; *Mark Stone and Sandra Brown* for Metro Cab; *Robert Stewart and Daniel Hisson* for Associates' Committee Representing Associates of Metro Cab Company Limited.

DECISION OF THE BOARD; May 9, 1997

1. This is an application for interim relief under section 98 of the *Labour Relations Act, 1995*. It is brought in the context of the union's complaint (the main application, Board File No. 0248-97-U).

that the responding parties have failed to provide certain information required by the duty to bargain in good faith in section 17 of the Act.

2. The union bargains for approximately 454 dependent contractors who drive cabs for Metro Cab Company Limited (“Metro”), the broker, and its Associates in Metropolitan Toronto. By decision of the Board reported as *Diamond Taxicabs Association (Toronto) Limited*, [1995] OLRB Rep. June 753 pursuant to an application under subsection 1(4) of the Act, relating to three Toronto brokers, (Diamond, Co-op and Metro), Metro and its Associates were declared to be one employer. The respondent Metro Associates’ Committee represents Metro’s Associates. In that decision the term “Associates” was defined as follows:

Associate means a taxi fleet owner, operator, lessee, custodian or agent who owns or controls more than one taxi or taxi licence, or a single taxi licence owner who is a non-driving owner, and who carries on business in association with one or more broker.

We adopt the same meaning.

3. The parties are engaged in bargaining for their second collective agreement. The union has requested financial and other information from both Metro and the Associates. The union puts its request for bargaining information in the context of the history between these parties, much of which is set out in the subsection 1(4) decision referred to above, and need not be repeated here. In settling the first collective agreement between these parties by an Award dated December 9, 1994, Arbitrator MacDowell underlined the difficulty presented by the fact that the parties did not share a common information base on the economic issues. To address this, various provisions and measures were put in place as set out in that Award. Nonetheless, the parties have arrived at bargaining for their second collective agreement without the desired common information base. In this application for interim relief the union asks for the information to be produced so that bargaining can proceed.

4. The union also notes as context for its request the provision of the collective agreement in Article 25.08(d):

- (d) Each party and representative must supply to the other, upon request, all information that it would be obliged to provide under section 15 [now 17] of the Labour Relations Act, and which is arguably relevant to the economic terms of the collective agreement. Such information will include documents within its control, and facts reasonably believed to be true based on information and belief.

5. Having heard the parties’ arguments and considered all the material before me, it is clear that the entitlement of the union to the basic economic information requested is not disputed except as indicated below. The main objection to the information requested from the responding parties is the actual lease agreements. The responding parties both take the position that it is inappropriate to order that the leases be disclosed in that they have information in them that does not pertain to bargaining between these parties and also contains information that is sensitive in the sense of providing information that would not normally be available to the various competitors in the industry. The Associates point out that there is competition for plates, leases and favorable terms within the group of Associates. There was opposition as well to providing financial information in a manner that would identify the names of the individuals or Associates with any specific information. And Metro says it has produced the information it has and the rest is in possession of the Associates.

6. I have considered the factors normally considered by the Board on application for interim relief, i.e. whether there is an arguable case on the main application and whether the balance of harm from a labour relations standpoint favours the issuing of an interim order. See *LOEB Highland*, [1993] OLRB Rep. March 197. There is in my view an arguable case on the merits. Further, it is my view, and

it was not contested in argument except for the points mentioned above, that there is no serious harm that would flow to the responding parties from the granting of an interim order. Further, it is my view that considerable benefit would flow to the parties' bargaining relationship from granting an order providing the information both sides need in order to bargain.

7. As to the provision of the lease agreements, it is my view that there is insufficient reason to except them from the information to be provided. The responding parties did not indicate, when asked, that there was anything substantive that would be argued if the main application proceeded that was different than what was before the Board at the moment. The leases are documents which are fundamental to the economic arrangements in this industry and thus are important to the union's ability to structure its economic proposals. Further, on the question of identifying economic information with the names of any Associates or individuals, it appears, particularly in light of the different roles various people play in this industry, and the large variety of interlocking relationships, that it would be very difficult to analyze or verify the accuracy of the material provided without the provision of the names. Further, the major concern expressed about confidentiality will be dealt with by way of restricting the use the union can make of the material, and the number of people with access to it.

8. Both responding parties indicated that if an order were to issue a process of dividing the responsibility for collecting the information would be of practical assistance in having the information provided, and they both argued any order should apply to lessees as well. Given the section 1(4) order by which the responding parties are considered to be one employer for the purpose of the Act, the obligation is binding on both of them. However, the directions for collecting the information have taken into account the process outlined by the responding parties.

9. Having regard to the above, the Board orders and directs as follows:

The Associates' Committee and Metro are directed to produce the information requested by the union in its letter of February 16, 1997 to the union as soon as possible, and in any event no later than May 30, 1997. As a mechanism to provide for the collection of this information the Board orders as follows:

- (a) Metro is to provide to the union a list of their Associates, their floaters and their single car members, along with their addresses, telephone numbers and fax numbers, and the plate numbers they operate, by May 12, 1997.
- (b) The primary Associates are to provide to the Associates' Committee the names, addresses, telephone and fax numbers of all sub-Associates and their cab numbers by May 12, 1997.
- (c) Prior to sending out the material set out in paragraph (g) below, the Associates' Committee is to provide Metro the list of Associates to whom the Associates' Committee proposes to deliver the material. Metro is to forthwith provide the Associates' Committee with any suggested additions.
- (d) Metro shall forthwith post this decision in its offices in a location or locations most likely to come to the attention of the Associates, and will use the dispatch system on a sufficient number of occasions between May 10 and May 25, 1997 to bring to the Associates attention the existence of the decision

and to reinforce the obligations to provide the information to the Associates' Committee by May 25.

- (e) All Associates (whether a primary Associate, sub-Associate or any other designation) are to provide to the Associates' Committee no later than May 25, 1997 the following information current as of April 30, 1997:
 - (1) Name, address and phone number of each driver (including lessees, floaters and shift drivers) driving for the Associate and cab number.
 - (2) If the driver is a lessee,
 - (i) a copy of the lease agreement;
 - (ii) the cab number;
 - (iii) the price he is paying for the plate including an indication of what the price includes, i.e. plate lease, renewal fees, dispatch fees, insurance and whether monthly or weekly;
 - (iv) his seniority with the Associate;
 - (v) his seniority with the brokerage;
 - (vi) a list of drivers who drive for the lessee;
 - (vii) the cost of the shift they are paying to the lessee.
 - (3) If the Associate is a multi-lessee himself and leases no plates, the following information is to be provided in respect of shift drivers:
 - (i) the name, address, telephone number and cab number of each driver driving for the Associate;
 - (ii) the seniority date with the Associate and the seniority date with the brokerage;
 - (iii) a breakdown of the drivers' shift premiums along with any records that would substantiate the statement;
 - (iv) an indication whether the driver is full or part-time;
 - (v) an indication whether or not benefits are paid on the drivers behalf;

- (vi) an indication whether or not E. I. premiums are paid on behalf of the driver.
- (f) All lessees and drivers are directed to forthwith provide any necessary information requested of them by an Associate to allow the Associates to provide the above information to the committee.
- (g) To cause the production of the above information:
 - 1. The Associates' Committee shall deliver to all Associates a copy of this decision together with a covering letter, indicating what information is to be provided and to whom at the Associates' Committee the information should be sent, in the most expeditious manner available which is most likely to bring it to the attention of the Associates whether by hand, facsimile transmission or priority post, by May 16, 1997;
 - 2. The Associates' Committee shall keep a written record of all steps taken by it in connection with delivery of the above letter and decision and the response that it gets from the Associates.
- (h) The union is ordered to keep all material disclosed above confidential and to restrict access to the material disclosed to union counsel and Messrs. Havell, Collins, Garvey and Ghadban unless leave of the Board is otherwise granted. The union is to use the material disclosed only for purposes of collective bargaining, any proceedings arising under the *Labour Relations Act, 1995* and collective agreement administration.

10. In the event of any non-compliance by Metro, an Associate, lessee or driver in the production of the material ordered, the parties may return to the Board for an enforcement of the order on short notice. All parties should understand that the above directions are part of an order of the Board; failure to comply is potentially contempt of the Board which can be punished by the Courts by various measures including criminal prosecution.

11. Having regard to the submissions before me, it is appropriate to adjourn the main application *sine die*. Unless any party asks that it be brought back on within one year of the date of this decision, it will be dismissed.

0649-96-T; 0397-97-M Canadian Union of Public Employees, Applicant v. Metro Toronto Civic Employees' Union, Local 43, Responding Party v. Darius Masalas, Harro Bauer, Woodrow A. Higgins, Danny Scheibli, Brian Morgan, Thomas Lenathen and Earl Gordon, Interveners

Trusteeship - Board consenting to six-month continuation of trusteeship by CUPE over CUPE Local 43

BEFORE: *R. O. MacDowell*, Chair.

APPEARANCES: *Raj Anand, Andrew Pinto, Ron Moreau and Gerry Lee* for the applicant; no one for the responding party individually or separately; *Darius Masalas, Harro Bauer, Woodrow A. Higgins, Danny Scheibli, Brian Morgan, Thomas Lenathen and Earl Gordon* on their own behalf.

DECISION OF THE BOARD; May 13, 1997

1. To make this decision easier to read, the applicant Canadian Union of Public Employees will be referred to as “CUPE” or “the parent union”, and Metro Toronto Civic Employees’ Union, Local 43, will be referred to simply as “the local union” or “Local 43”.

I

2. This is an application under section 89 of the *Labour Relations Act*, in which CUPE seeks the Board’s consent to continue its supervision or control over Local 43, for a further six months. Local 43 was placed “under trusteeship” on May 15, 1996, so that an administrator appointed by the parent union could address serious financial and operational concerns within the Local. CUPE seeks an extension of that “trusteeship” until November 15, 1997, in order that there can be an orderly return to local autonomy.

3. On May 12, 1997, the Board held a hearing to receive representations from local union members potentially affected by the parent union’s request for an extension of the trusteeship. Four interveners supported CUPE’s request for an extension - with the reservation that, in their submission, six months was insufficient to deal with the problems which, they said, had been accumulating for some years. These four interveners thought that the trusteeship should be extended for a full year. Three interveners resisted the parent union’s request for an extension of six months, suggesting that an extension of four weeks to four months would be sufficient to put the Local’s affairs in order.

4. It was common ground that there were serious problems in the Local which warranted the imposition of trusteeship in May 1996, and that the administrator, Ron Moreau, has made significant and good faith efforts to find solutions for those problems (more accurately, to assist local union members and officials to develop *their own* solutions). In other words, there was really no dispute that *some* extension of the trusteeship was in order. The only question was: “For how long”? And, in answering that question, it may be useful to briefly mention some of the problems that brought on the trusteeship in the first place, as well as some of the steps that have been taken to rectify the situation.

5. I do not think that it is necessary to deal with these matters in any detail. However, I do think that it is useful to sketch in the context in which the present application arises.

II

6. CUPE Local 43 is one of the largest CUPE locals, with 5,000 regular members (and 1500 seasonal members) who work at dozens of locations throughout Metropolitan Toronto. Local 43 has collective agreements with: the City of Toronto, the Municipality of Metropolitan Toronto, the Parking Authority of Metropolitan Toronto, City Homes, and the Port Authority of Metropolitan Toronto. To service the needs of this diverse membership, the local has a network of officials, at various levels, elected and appointed, full-time and part-time, including: negotiating teams, health and safety committees, 118 stewards, and so on. The Board was advised that Local 43 has a budget of about \$3 million which must, of course, be administered and accounted for by these local union officials (at various levels).

7. Local 43 has been in existence for decades; however, by early 1996, it was confronted with a series of problems that had been accumulating for some time. The Local owed the parent union over a million dollars, and was not paying its utility bills. There were widespread allegations of financial mismanagement - an accusation later confirmed by a forensic accountant, who found many of the Local's practices highly irregular. There were allegations of political corruption, election misconduct, manipulation of records, and the removal of stewards without cause or "due process". The grievance arbitration process was disorganized and ineffective, and there was an enormous backlog of unresolved WCB cases.

8. Rivals within the Local routinely traded insults and charges, so that there was an unprecedented number of trial proceedings between members, and a complete breakdown in the relationship between local union officials. There were civil proceedings and complaints to the Human Rights Commission. Membership meetings had become a forum for partisan bickering, occasionally punctuated by verbal abuse and violence - to the extent that the police had to be called and it became difficult to conduct ordinary union business.

9. By the spring of 1996, the level of turmoil and dissension had reached a point that it began to attract media attention. Accordingly, on May 14, 1996, a special executive meeting of Local 43 *unanimously* requested the parent union's intervention. The Local was placed under trusteeship the following day, and Ron Moreau became its administrator.

10. Over the next few months, Moreau took steps to restore order and address the Local's many problems. All of the local officers were immediately removed (as contemplated by the CUPE constitution), but a number of them were kept on, as individuals, to assist in the transition - as were the negotiating team(s) and the steward body. Membership meetings were continued, and in the fall of 1996 (things slow down over the summer) members were invited to serve on a series of committees, whose task was to review and revise the union's operating rules. These committees were: fiscal review, election practices, grievance and arbitration, and, as a clearing house for all of the committees, a "bylaws review committee".

11. The Bylaw Review Committee was the most important one because the inadequacy of the existing bylaws (in substance and in application) was thought to be one of the main reasons for the Local's accumulating problems. The Bylaw Review Committee had to address such diverse issues as: the appropriate "managerial framework" for the Local; the role of union officers at various levels and their relationship to the membership; the payment of salaries, car allowances and per diems; election policies and practices; and so on. At the same time, Moreau commissioned auditors to review the Local's financial affairs from 1994 to the present, and initiated training programs for local officials, drawing on experienced personnel seconded from CUPE's national office.

12. Moreau's overall objectives can be simply stated: to put in place an effective mechanism for resolving employee grievances; to reduce the WCB backlog; to establish a schedule for repaying the Local's outstanding debt; to develop a system of financial controls to avoid difficulties of the kind that has arisen in the past; to encourage an effective leadership structure for what is admittedly a large and diverse local; and to create an effective framework for the conduct of local elections. The material filed by CUPE demonstrates, step by step, how the administrator has sought to accomplish those objectives. And, it is interesting to note that the objecting interveners do not quarrel with these goals, or challenge Moreau's good faith efforts to achieve them.

13. I do not think that it is necessary to review the details of Mr. Moreau's activities over the last year, the many meetings that have been held, or the deliberations of the various committees that have been established. It suffices to say that, in my view, there is nothing inappropriate in the steps taken by Mr. Moreau to restore the Local's financial and administrative integrity; moreover, I am

satisfied that that process must be completed before full autonomy can be restored, with the conduct of local elections.

14. In my view, the restructuring currently in process will take several months to complete, and it is important that it be undertaken carefully and completed properly, or there may be a recurrence of the kinds of problems that produced the organizational breakdown before. Indeed, having heard the parties' representations, and reviewed the material in the file, it appears to me that six months is the *absolute minimum* extension necessary to restore order in the Local. In fact, a longer period may well be required; and to the extent that the members are "turned off" (as most of the interveners suggest they are), it may take some time and effort to reinvigorate local union democracy.

15. It is important to remember that a trade union is not like a corporation, where authority can be exercised "from the top down", by full-time managers imposing their wishes and wielding the threat of discharge. A trade union is more like a club: an organization of workers that conducts much of its business after hours or on weekends, when its members are available. And like a club, the local union relies, to a large extent, on part-time officials and volunteers who are not lawyers or accountants and who work for the good of the organization on their own time.

16. In this setting, it is unrealistic to expect a speedy resolution of the kinds of problems which have plagued this Local in recent years - unless the administrator were prepared to exercise truly dictatorial powers. But, of course, top-down imposition of solutions would risk poisoning the environment and alienating the membership even further. On balance, therefore, steady progress and participation are to be preferred, even if it takes more time.

17. On the basis of the material filed and the representations made, I am satisfied that following the imposition of the trusteeship, the parent union has taken reasonable steps to address and rectify the Local's many problems: financial and organizational. A full financial audit (1994-1997) is almost completed, most of the stewards have undergone training, the grievance-arbitration and WCB processes have been improved, and later this month the membership will begin debate on a new set of draft bylaws, which will pave the way for an election in the fall (the usual time for holding local elections). These are sensible steps, which are still in progress, and will take time to complete.

18. I am satisfied, therefore, that an extension of the trusteeship for a minimum of six months is required to ensure that these new systems are in fact viable and that they enjoy the broad adherence of the membership. Consequently, at the conclusion of the hearing on May 12, 1997, I indicated that the Board would give its consent to the minimum 6-month extension requested by CUPE. This written decision confirms that consent.

III

19. Strictly speaking, there is no obligation to give specific notice of this decision to the 5,000 or more members of CUPE Local 43. But the parties all agree that it is desirable that notice of the extension of the trusteeship (until November 15, 1997) be brought to the attention of the members of Local 43 who may be interested. At the hearing, the parties canvassed two means of doing so:

- (a) a mailing of this decision to the Local membership (which might also include an update from the administrator about the steps he has taken and how the process is to unfold over the next few months); and/or
- (b) a distribution of this decision by the members' employers, along with their paycheques.

The problem with option (a) is that the Local's mailing list may be somewhat out of date. The problem with option (b) is that the employers took no part in these proceedings and might not welcome even the minor inconvenience of including a copy of this decision with their employees' paycheques - although, in this regard, the union has undertaken to reimburse the employers for any actual expenses involved.

20. Counsel for CUPE urged the Board to ascertain whether the employers would have any objections, and, if not, to make the appropriate (consent) order. Counsel observed that the employers were all public bodies with which Local 43 had had a collective-bargaining relationship for many years, so it was unlikely that they would raise any objection - provided that the union covered any actual costs involved. Counsel observed that while the members' addresses may have changed, they all have an interest in picking up their paycheques, so it is not unusual for employers to deliver information in this way.

21. There is something to be said for the submission that a notice accompanying a paycheque may get more attention than a notice in the mailbox; however, I have concluded that option (a) is preferred and is sufficient. I note, again, that there is no obligation to provide a copy of the Board's decision to anyone other than those who directly participated at the hearing. The question of providing union members with copies of the decision only arose because the parties all suggested that this might be a helpful and sensible thing to do. However, that said, the employers were neither a party to the OLRB proceeding nor would one ordinarily expect an employer to have any responsibility for distributing material concerning local union affairs. Finally, it appears that a general mailing by the administrator will reach virtually all of the local union's members (making any distribution by the employers redundant and unnecessary). And, of course, if there are particular problems, they can be raised with the employers directly; for, as I have already noted, Local 43 has a long-standing collective-bargaining relationship with each of the employers mentioned above.

1688-96-R United Steelworkers of America, Applicant v. Mining Technologies International Inc., Responding Party

Bargaining Rights - Collective Agreement - Sale of a Business - Union making sale of a business application and alleging that "MTI" is a successor to "E" - Board ruling that collective agreement relied on by union to establish broader bargaining rights was made in contravention of the Act and, therefore, may not be relied on - Collective agreement relied on by union involving early termination of earlier collective agreement without consent of the Board or, alternatively, amendment of collective agreement extending its term of operation - Neither result permitted under the Act - Board concluding that scope of union's bargaining rights did not include location in Elora, Ontario - Application dismissed

BEFORE: *Laura Trachuk*, Vice-Chair.

APPEARANCES: *Mark Rowlinson* and *Ken Dawson* for the applicant; *Andra Pollak*, *Lynn Maxwell* and *Peter Snucins* for the responding party.

DECISION OF THE BOARD; May 8, 1997

1. This is an application under section 69 of the *Labour Relations Act, 1995*. The applicant (referred to as the "union") alleges that the responding party (referred to as "MTI") is a successor to Epton Industries Inc. (referred to as Epton). MTI is alleged to have purchased the rubber division of Epton's business. At the outset of the hearing, MTI raised a preliminary objection to proceeding with

the application on the basis that the scope of the union's bargaining rights did not extend to the location of its business in Elora, Ontario and therefore the application should be dismissed. The following is the Board's decision with respect to that preliminary objection.

The Facts

2. Very few of the facts relevant to this motion were disputed. The United Rubber, Cord, Linoleum and Plastic Workers of America, Local No. 73 has had a long-standing bargaining relationship with Epton Industries Inc. and its predecessor. The United Steelworkers of America is successor union to that local.

3. Epton is a well-established manufacturing operation which makes rubber and plastics products. By 1993, it was in financial difficulty and filed for bankruptcy protection. Mr. William Thomson, a principal of a consulting firm which assists in such "crisis" situations, became the president, C.E.O. and sole director of the company. Price Waterhouse was assigned to monitor the situation.

4. At the time that Mr. Thomson took over the company, the union and Epton were bound by a collective agreement which was in effect from February 29, 1992 to February 28, 1995. The recognition clause contained in that collective agreement provides as follows:

2.02 In accordance with the certification of the Ontario Labour Relations Board as of July 25, 1945, the Company recognizes the Union as the sole bargaining agency for the hourly-rated factory employees and scrap collectors at its plants and its warehouses located in the Regional Municipality of Waterloo, SAVE AND EXCEPT, watchmen, guards, shift foremen, floor foremen, having authority to hire, promote, discharge or otherwise effect changes in the status of employees or effectively recommend such action and hourly rated clerks in the following departments or occupational classifications: Engineering Department, Office, Time Checking Clerks, Mail Boys, Industrial Products Construction Clerks, Planning Department Clerks, Production Schedulers, Physical Laboratory Operators and Industrial Nurses.

5. Mr. Thomson was attempting to sell Epton and he perceived that the fact that the collective agreement was about to expire as well as certain items in that agreement, such as a pension plan with a funding shortfall of half of a million dollars, to be an impediment to a sale. In the fall of 1994, he therefore asked the union to commence early negotiations for a collective agreement. The union agreed to participate in such negotiations and on December 9, 1994 a memorandum of agreement was signed. The memorandum provided that it would not take effect unless and until the company was sold as an ongoing business by February 28, 1995 or within 60 days thereafter. The memorandum was worded as follows:

This Memorandum of Settlement entered into this 9th day of December, 1994 between Epton Industries Inc. (hereinafter called the Company) and Local 73, United Rubber, Cork, Linoleum and Plastic Workers of America (hereinafter called the Union) is to amend the Collective Labour Agreement and Pension Plan C-101854 for the period February 28, 1995 to February 28, 1998, *** subject to:

The Company shall provide the Union with any registered Pension Commission of Ontario documentation and the latest revised Actuarial Report.

The Company will make any payments outstanding coincidental with the investment from a new investor/buyer.

The Company shall inform the Union and the Pension Committee of Ontario of any payments which are not remitted immediately as such shortfall becomes apparent.

The Pension Plan amendments are subject to the approval of the Pension Commission of Ontario and all pension language amendments are subject to review by the Union's Solicitor, Pension Actuary and International Union prior to becoming effective.

In the event the Union's Pension Actuary, Solicitor and/or the International Union advise the Local Union the amendments contained in Letter No. 21 and/or Clause 7.12 of the Pension Plan in this tentative Memorandum of Settlement necessitate any modification to the extent that such modification is necessary ensure the amendments contained herein shall provide no less than \$21.00 of pension entitlement than currently provided for in the Pension Plan, the Company and Union shall resume immediate negotiations to incorporate the required changes, if any.

*** Upon the completion of such negotiations, if any, this tentative Memorandum of Settlement shall be the [sic] signed as a Memorandum of Agreement between the Company and Union for a new Collective Labour Agreement dated the [sic] February 28, 1995 to February 28, 1998 subject to the conditions contained herein.

Epton Industries Inc. being sold as an ongoing business subject to the terms and conditions as defined in all Agreements between the Company and the Union; and

In the event the Company is not sold as an ongoing business on or before February 28, 1995, the Memorandum of Agreement shall not be binding on either the Company and/or the Union unless:

- a) The Company has a signed agreement with a prospective purchaser of the Company as an ongoing business; and
- b) the offer to purchase the Company as an ongoing business shall be finalized no later than sixty (60) days commencing as of February 28, 1995 in which event all the provisions contained herein shall be immediately retroactive to February 28, 1995; and
- c) should there be no offer to purchase the Company as defined in a) and/or b) and the Company assets are sold in whole or in part to finalize the conditions of the bankruptcy as pertains to Epton Industries Inc. any partial or complete plant closure shall be subject to the terms of the 1992 Collective Labour Agreement between the Company and the Union; and
- d) Employees currently eligible or who become eligible for Special Early Retirement or Early Retirement who are on the rolls of the Company on the date on which the members of the Bargaining Unit voted upon the ratification of the tentative Memorandum of Settlement, and who retire, shall be guaranteed the 1995 Pension One Time Enhancement of \$23.00 retroactively to the date of the employee(s) retirement upon the sale of the Company.

All dates and monetary amounts be updated in accordance with the terms of this Agreement; and

This Memorandum of Settlement is tentative and subject to the approval of the members of the Bargaining Unit and the International Union.

6. A list of "amended terms" was attached to the above agreement which was ratified by the members of the bargaining unit on or about December 9, 1994. One of those terms was an amendment to the recognition clause to extend it to include Wellington County in which the subject MTI operation is located. The agreement also contained some changes to the pension, vacation and seniority provisions.

7. It is clear from the testimony of both of the Epton managers who testified as well as the union's witness that the parties were trying to negotiate an agreement which would make the company more attractive to prospective purchasers while accommodating the union's need to protect its bargaining rights if the business was moved. However, the parties were also trying to avoid having the reduced terms, particularly the pension changes, apply to the agreement between the union and Epton. It appears that this was either because the union wanted to be able to make its full claim against Epton if it was not sold or because it wanted to be able to make its claim against Epton even if it was sold.

8. The memorandum was put into collective agreement form and was signed by the parties on January 13, 1995.

9. There was no agreement to purchase Epton by the end of February and on February 22, 1995 the union and the company extended the date by which the 1995-1998 agreement would come into effect upon a sale to March 31, 1995 plus 60 days. Apparently the timing of these agreements was intended to coincide with a work sharing agreement reached with Canada Employment. The February 22, 1995 agreement between Epton and the union provides as follows:

This Memorandum of Agreement entered into this 22nd day of February, 1995 between Epton Industries Inc. hereinafter called the "Company" and the United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 73 hereinafter called the "Union" is to amend the terms of the Memorandum of Settlement entered into December 9th, 1994, related to the sale of Epton Industries Inc. and Pension Plan C-101854 which shall be incorporated into this Memorandum of Agreement, *** subject to:

It is agreed that in the event Epton Industries Inc. is not sold as an ongoing business on or before February 28, 1995, the Company and Union agree to the following amendments to the December 9th, 1994 Memorandum of Settlement as follows:

SALE OF EPTON INDUSTRIES INC.

In the event the Company is not sold as an ongoing business on or before March 31, 1995, the Memorandum of Agreement executed between the Company and Union on the 13th day of January, 1995 shall not be binding on either the Company or Union unless:

(a) the Company has a signed agreement with a prospective purchaser of the Company as an ongoing business; and

(b) the offer to purchase the Company as an ongoing business shall be finalized no later than sixty (60) days commencing as of March 31, 1995, in which event, all the provisions as contained in the 1995-1998 Collective Labour Agreement shall be immediately retroactive to February 28, 1995.

(c) should any offer of purchase not be concluded on or before March 31, 1995 as defined in (a) and/or (b) and the Company assets are sold in whole or in part to finalize the conditions of the bankruptcy as pertains to Epton Industries Inc., any partial or complete plant closure shall be subject to the terms and conditions of the 1992-1995 Collective Labour Agreement between the Company and the Union.

The Company and Union agree to the following understanding in regards to the 1995 - 1998 Collective Labour Agreement, Letter No. 19, Letter No. 21 and the Pension Plan - One Time Pension Enhancement should the sale of Epton Industries Inc. not occur on or before February 28, 1995.

10. In spite of the existence of the 1995-1998 document, the witnesses all unequivocally agreed that the union and Epton were at all times bound by the terms of the 1992-1995 agreement which was automatically renewed on February 28, 1995 for one year according to its automatic renewal clause which provides as follows:

13.01 This Agreement shall be effective from February 29, 1992 and shall remain in full force until February 28, 1995, and thereafter from year to year unless either party gives to the other party, notice in writing of cancellation within a period of ninety (90) days prior to February 28, 1995, or any anniversary thereafter.

11. There was no agreement to purchase the company by the end of March or at any time except for the alleged sale to MTI.

12. Throughout this period Epton was in financial difficulties and, although it had orders to fill, had cash flow problems which affected its ability to acquire raw materials. Mr. Thomson testified that throughout this period Epton gave priority to its plastics/automotive division to honour its supply contract with General Motors. The local's former president did not necessarily agree with this factual claim but the Board finds it likely that the automotive division was prioritized in the circumstances. In any case, this factual dispute is not germane to the Board's decision.

13. By the end of June, 1995, Epton's financial problems had become severe and it found that it would not be able to reopen after the plant shut down in early July without an infusion of money. Mr. Thomson advised General Motors (GM) of this situation as it was relying upon a product from the plastics division for the operation of five of its plants. As a result, the Epton plant was flooded with representatives of various interests, including GM's, and an arrangement was worked out.

14. Epton agreed to file for bankruptcy on August 13, 1995. However, it was imperative that the plastics division continue to produce the GM product until an alternative supplier could be found. As a result, Epton, Price Waterhouse, the trustee in bankruptcy, GM and the union, came to an agreement as to how the plant would continue to operate. According to the witnesses, this agreement involved Epton amending its 1992-1995 agreement to extend the recognition clause to the Province of Ontario in the 1995-1998 agreement. The union and Price Waterhouse entered an operating agreement about the terms and conditions under which the employees would work in the plant during the bankruptcy and which contained a paragraph purporting to bind any potential purchaser of the business, or part of it, to the 1995-1998 collective agreement between the union and Epton.

15. The above agreements were worked out with the participation of several lawyers. The collective agreement amendment signed by Epton was held in escrow until the union ratified the operating agreement. The amendment signed by Epton provides as follows:

This Memorandum of Agreement is entered into this 3rd day of August, 1995 between Epton Industries Inc. (hereinafter called "the Company") and the United Steelworkers of America on behalf of Local 73 of the United Steelworkers of America (formerly United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 73) (hereinafter called "the Union") is to reflect the merger between the United Rubber, Cork, Linoleum and Plastic Workers of America and the United Steelworkers of America as a result of which United Steelworkers of America on behalf of its Local Union No. 73 is now the successor of the United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 73 as Bargaining Agent for the employees of the Company and to amend the Collective Agreement in effect between the parties to reflect that the Recognition Clause in the revised Collective Agreement effective 1995 to 1998 shall provide as follows:

In the event the Company is not sold as an ongoing business on or before August 3, 1995, Article 2.02 of the Collective Agreement shall be amended and shall read as follows:

The Company recognizes the Union as the sole bargaining agency for all hourly-rated factory employees and scrap collectors at its plants and warehouses located in the Province of Ontario SAVE AND EXCEPT watchmen, guards, shift foremen, floor foremen, having authority to hire, promote, discharge or otherwise effect changes in the status of employees or effectively recommend such action and hourly rated clerks in the following departments or occupational classifications: Engineering Department, Office, Time Checking Clerks, Mail Boys, Industrial Products Construction Clerks, Planning Department Clerks, Production Schedulers, Physical Laboratory Operators and Industrial Nurses.

16. The relevant paragraphs of the operating agreement between Price Waterhouse and the union provide as follows:

1. The collective agreement in force between Epton and the Union on the day immediately prior to the bankruptcy ("Collective Agreement") which is attached as Appendix 1 to this Agreement shall continue to apply to the operation of the Epton business during the bankruptcy and PW shall comply

with the terms of the Collective Agreement, except as modified by the terms of this Agreement. In the event of an inconsistency between the Collective Agreement and this Agreement, this Agreement prevails. ...

7. Should the business or part of the business of Epton be sold, this Agreement in relation to the part of the business that is sold shall terminate immediately prior to the closing of that sale and the 1995-1998 collective agreement, as amended, between the Union and Epton shall come into force with respect to that part of the business on the closing of that sale so that the purchaser of the business becomes bound by the 1995-1998 collective agreement, as amended, subject to section 64 of the *Labour Relations Act*. The Union acknowledges that subject to the limitations contained in paragraph 2 of this Agreement the Participants are not liable and shall not be liable to the Union or any employee represented by the Union for any matter related to the 1995-1998 collective agreement, as amended.

17. The August 3, 1995 agreement set out in paragraph 15 was attached as an appendix to the 1992-1995 agreement which was attached to the operating agreement.

18. In November, 1995 MTI entered into the transaction with the trustee, Price Waterhouse, that the applicant alleges is a sale pursuant to section 69 of the Act.

19. The trustee wound down the operation of the plastics division by December 1995 and the last employee left the plant on January 26, 1996.

20. The Board did not hear any evidence as to whether any other parts of the Epton business have been "sold".

21. MTI had considered buying Epton, or part of it, prior to the bankruptcy in August 1995. It was therefore advised by Mr. Thomson of the terms of the 1995-1998 agreement.

Relevant Sections of the Act

22. The relevant sections of the Act are as follows:

55. There shall be only one collective agreement at a time between a trade union or council of trade unions and an employer or employers' organization with respect to the employees in the bargaining unit defined in the collective agreement.

58. (1) If a collective agreement does not provide for its term of operation or provides for its operation for an unspecified term or for a term of less than one year, it shall be deemed to provide for its operation for a term of one year from the date that it commenced to operate.

• • •

(3) A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.

• • •

(5) Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its term of operation.

69. (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the

employer for the purposes of the application as if the person were named as the employer in the application.

Submissions of the Parties

23. MTI requests that the Board dismiss the application on the grounds that the scope clause of the relevant collective agreement does not extend to its operation in Elora so the applicant cannot claim bargaining rights with respect to its employees. It argues that the union and Epton's attempts to expand the scope clause in the event of a sale failed for a number of reasons. It claimed firstly that the August 3, 1995 agreement could not amend the 1995-1998 agreement as it purported to do because the 1995-1998 agreement had no legal status, either because there was no extension to the February 22, 1995 memorandum, and/or because it had not come into existence as it was subject to a condition precedent.

24. MTI's second, and in the Board's view more persuasive, argument is that if the 1995-1998 agreement were ever to come into effect it would violate the *Labour Relations Act*. MTI points out that the parties were governed by the 1992-1995 agreement as a result of the automatic renewal clause. The term of the operative agreement was therefore February 28, 1995 to February 28, 1996. If the 1995-1998 collective agreement were to come into effect upon the alleged sale in November, 1995 there would be two collective agreements in effect contrary to section 55 of the Act. MTI argued that this is not merely a case of changing one or two terms during the operation of a collective agreement, which the parties are entitled to do, but the imposition of an entirely new agreement. The Act does not permit the existence of two collective agreements. On the other hand, the company argues, if the 1995-1998 collective agreement were to supersede or amend the 1992-1995 renewed agreement, it would change the term of operation of the existing collective agreement which would also be a violation of the Act, specifically section 58(5).

25. In response to a question from the Board MTI denied that it was possible for the Board to find certain sections of the agreement, specifically the term of operation, to be a violation of the Act but to find that the rest of the agreement was binding. MTI argued that the 1995-1998 agreement was negotiated as a whole and to "read out" any sections would be to rewrite the parties' negotiated agreement. The union did not address this argument.

26. MTI also asserts that the operating agreement between the union and Price Waterhouse would not apply to any sale that might have occurred between it and the receiver in November, 1995 because MTI bought assets from the rubber division and the agreement only applied to the automotive/plastics division. MTI bases its argument that the agreement only applied to the automotive/plastics division on the claim that only the automotive division was operating after the agreement was negotiated and that the agreement in certain sections refers only to that division.

27. MTI also argues, in the alternative, that although the operating agreement exempted General Motors from successor status it was, in fact, a successor employer because that agreement and the continued operation of the automotive division were for its benefit.

28. MTI referred the Board to the following decisions: *Danver Ambulance Service*, [1985] OLRB Rep. June 833; *Ferano Construction Limited*, [1989] OLRB Rep. May 446; *Turney et. al. v. Zhilka*, [1959] S.C.R. 578; *Liquor Control Board of Ontario* 29 L.A.C. (2d) 289; *Hobart Manufacturing Co. Ltd.* 21 L.A.C. 141.

29. The union responds that the Board should look to the clear intention of the parties to the various agreements to interpret the meaning of those agreements. If the agreements are not unlawful then effect should be given to them according to the intentions of the parties. It argues that it was clear that Epton and the union entered into a contingent agreement (the 1995-1998 agreement) which would

amend the 1992-1995 agreement in the event of a sale. The union notes that the original document signed by Epton and the union in December 1994 illustrates that the agreement is a contingent amendment to the existing agreement, not a new agreement.

30. The union argues that the two sections of the Act which the company claims are violated by the 1995-1998 agreement exist to protect the rights of employees to exercise their wishes to terminate bargaining rights or to change unions through an “open period” and not to assist successor employers. The union notes that there was an “open period” in the 60 days prior to the automatic renewal in February, 1995.

31. The union rejects MTI’s argument that the August 3, 1995 amendment and the agreement with Price Waterhouse did not apply to the rubber division. It argues that neither the facts presented, nor the agreements themselves, can support such an interpretation. It claims that the evidence demonstrates that the rubber division was in operation up until the declaration of bankruptcy on August 14. Furthermore, it points to the fact that the August 3 agreement was made a schedule to the 1992-1995 agreement in the operating agreement and the 1992-1995 agreement clearly applies to the whole business including the rubber division. The union also relies upon the language of section 7 of the operating agreement itself which refers to the “business or part of the business”.

32. The union denies that there were ever two collective agreements in operation for the same bargaining unit and therefore asserts that there has been no violation of section 55 of the Act. According to the union, up until November 1995 there was one collective agreement in effect, the 1992-1995 agreement as amended by the August 3 agreement and the operating agreement. After November, 1995 only MTI is bound by the 1995-1998 agreement. The predecessor or Price Waterhouse continued to be bound by the 1992-1995 agreement. There were not, therefore, two collective agreements in effect for the same bargaining unit. The two collective agreements covered two separate bargaining units so there was no violation of the Act. In essence, the union claims that the bargaining unit was split upon the sale so it is appropriate to have two separate collective agreements. It applies the same argument to the claim that the term of operation of the collective agreement was changed. The agreement with Epton has one term of operation and the agreement with MTI has a different term of operation. The term of the agreement with Epton was not amended so it did not run afoul of section 58(5) of the Act and the open period was preserved. The union asserted that there is no reason that the employees of MTI should have the benefit of an immediate open period.

33. In response to a question from the Board as to whether section 69 could apply to bind a successor to a collective agreement which never bound and was never intended to bind the predecessor, the union argued that the successor was still stepping into the shoes of the predecessor but stepping into an agreement which was actually an amendment which would only come into effect in the event of a contingency, specifically the sale.

34. The union refers to the following decisions: *John Lester Drugs Ltd.*, [1982] OLRB Rep. June 886; *Woodbridge Hotel* 13 L.A.C.(2d) 96; *Continental Group of Canada Ltd.*, [1980] OLRB Rep. Oct. 1381 and *Laidlaw Waste Systems Ltd.*, [1987] OLRB Rep. Oct. 1267.

35. MTI replies that section 69(2) of the Act could not apply to this situation because Epton was never bound by the 1995-1998 agreement itself, it was only bound by an agreement that a successor would be bound by that agreement. Section 69(2) cannot be used to bind a successor to an agreement which has never come into being. It denied that the 1995-1998 agreement was an amendment to the 1992-1995 agreement and argued that the existence of the full document, its language and the evidence presented, was all to the contrary. MTI argued that the union’s claim that upon a sale there is a split in the bargaining unit and therefore two collective agreements with different terms has no foundation in law. In any case, it argues, even if one accepts this premise, the result is that part of Epton’s business

was covered by a collective agreement with a specific term of operation and then, prior to the expiry of that term, became governed by a new agreement with a new term of operation, which is still a contravention of section 58(5).

Decision of the Board

36. The Board has carefully considered the submissions of the parties and has determined that the application must be dismissed. The union and Epton did not succeed in extending the scope clause of their collective agreement to the County of Wellington or the Province of Ontario and therefore the union cannot claim successor rights at MTI's location in Elora. The Board is sympathetic to the union's plea that the Board should give effect to the clear intentions of the "parties" and find that the 1995-1998 agreement applies to MTI. However, the "parties" the union is referring to are only the parties to the contractual arrangements and there is a third party, MTI, which is deeply effected by those agreements. In this case the agreement that the union and Epton and Price Waterhouse rely upon contravenes the *Labour Relations Act, 1995*.

37. There are a number of analytical paths one can follow in an attempt to understand what took place between the union, Epton and Price Waterhouse; however, each path leads to the result that the parties attempted to effect an early termination of their collective agreement without the consent of the Board and/or to amend their collective agreement extending its term of operation. Neither result is permitted under the *Labour Relations Act, 1995*.

38. The union and Epton negotiated, ratified and signed a collective agreement which on its face clearly states that it is in effect from February 28, 1995 until February 28, 1998. The memorandum of December 9, 1994 states "Upon the completion of such negotiations, if any, this tentative Memorandum of Settlement shall be the signed [sic] as a Memorandum of Agreement between the Company and the Union for a new Collective Labour Agreement dated the [sic] February 28, 1995 to February 28, 1998 subject to the conditions contained herein." However, the evidence of the witnesses was unequivocal that they automatically renewed their 1992 to 1995 collective agreement for a period of a year and that was the collective agreement by which their labour relations were governed. Therefore, if the 1995-1998 collective agreement legally "existed" at any time prior to February 28, 1996, there would be two collective agreements between the union and the employer for the same bargaining unit. If there are two such collective agreements, that is a violation of section 55 of the Act.

39. On the other hand, it was persuasively argued by the union that the 1995-1998 agreement superseded or amended the extended 1992-1995 agreement upon the alleged sale to MTI in November, 1995. It took effect at that time as a result of the language of the operating agreement with Price Waterhouse. The agreement with Price Waterhouse states as follows:

Should the business or part of the business of Epton be sold, this Agreement in relation the part of the business that is sold shall terminate immediately prior to the closing of that sale and the 1995-1998 collective agreement, as amended, between the Union and Epton shall come into force with respect to that part of the business on the closing of that sale so that the purchaser of the business becomes bound by the 1995-1998 collective agreement as amended, subject to section 64 of the Labour Relations Act.

40. Article 7 purports to terminate the 1992-1995 extended agreement for part of the business upon the sale of that part of the business. However, the Board's consent to the early termination of the collective agreement has never been sought as required by section 58(3). Furthermore, the above provision purports to replace the old agreement with a new collective agreement containing a different term of operation contrary to section 58(5). The 1992-1995 extended agreement applied to the whole of Epton's business, so the fact that this Article is only being applied to a sale of part of the business is irrelevant.

41. What is the effect of having two collective agreements in operation, terminating an agreement before it ceases to operate without the Board's consent or altering the term of operation of a collective agreement? The parties cannot rely on actions taken which are contrary to the Act and therefore the extended 1992-1995 collective agreement continues to exist as if it had not been terminated or the term of operation altered. In *Laidlaw Waste Systems Ltd.*, *supra*, the union was not permitted to rely upon arrangements which the Board found effectively terminated the collective agreement prior to its expiration and altered its term of operation as a bar to a certification application by another union. Likewise, in *Ledcor Industries Limited*, [1993] OLRB Rep. Aug. 758, the Board revoked a decision granting permission for early termination of a collective agreement on the basis that inadequate notice had been given. The Board would not permit the union to rely upon a subsequent collective agreement between the parties as a bar to an application by another union. The concern expressed by the Board in those cases is shared by the Board in these circumstances. Sections 55 and 58(5) serve to ensure that there is a specified, easily ascertainable open period upon which employees may rely in the event they wish to terminate their union's bargaining rights. If the applicant in this case is permitted to rely upon the 1995-1998 collective agreement with respect to the rubber division, the employees in that division are deprived of that open period. Presumably, the effect of a successful application would be to find that the MTI employees in Elora are covered by the 1995-1998 agreement and that the laid-off Epton employees have some entitlement to those jobs. There is no reason why the principle behind sections 55 and 58(5) should not apply to those employees. Furthermore, neither party argued that any other result would be appropriate in the event the Board found that Epton's and the union's agreements, or part of them, violated the Act.

42. In conclusion, the Board finds that the 1995-1998 agreement could not come into effect between Epton or MTI and the union because if it did, it would amend the term of operation of the collective agreement, which is prohibited by the Act. Therefore, the geographic scope clause contained in the valid collective agreement between Epton and the union does not cover the location of MTI's business in Elora. As the Board has made its determination according to the above-noted analyses, it need not consider the other arguments raised by MTI.

43. For all of the above reasons, this application is hereby dismissed.

1774-96-R Perth and Smiths Falls District Hospital, Applicant v. Ontario Public Service Employees Union, Canadian Union of Public Employees and its Local 2119, Association of Allied Health Professionals: Ontario, Independent Canadian Transit Union and its Local 6, Responding Parties v. Non-Union Employees, Perth and Smiths Falls District Hospital, Intervenor

Sale of a Business - Remedies - Representation Vote - Board earlier finding merger of two hospitals to be sale of a business - Board subsequently finding intermingling and determining that combined service/office/clerical unit and paramedical units appropriate - Board directing taking of representation votes and determining that all incumbent unions should be listed on ballot and that, because vast majority of employees in bargaining units unionized, there ought not to be non-union option on ballot

BEFORE: *Laura Trachuk*, Vice-Chair.

APPEARANCES: *Donna Guidolin, Shirley Rogers and Caroline Manley* for the applicant; *Kelly Waddingham, Richard Blair, David Wright, Bill McNicol and Roger Haley* for Ontario Public Service Employees Union; *Martha Rans, Betty Sommers and Doreen Beath* for Canadian Union of Public Employees; *Susan Ursel, Sylvia Davis, Maureen Fraser and Chris Luscombe-Mills* for Association of Allied Health Professionals: Ontario; *Nelson Roland, Dilip Yoga Sundram and Cindy Read* for Independent Canadian Transit Union; *David Burns* for the Non-Union Employees.

DECISION OF THE BOARD; June 24, 1997

1. This is an application under section 69 of the *Labour Relations Act, 1995*. In a decision dated March 20, 1997 the Board held that an intermingling of employees had occurred between the members of the numerous bargaining units represented by the responding parties. The Board held that the bargaining units should be combined into two bargaining units as requested by the applicant (referred to as the hospital). The Board also directed that two representation votes be held to determine which bargaining agent should represent the employees in each bargaining unit.

2. The Board directed that a representation vote be held to determine whether the Association of Allied Health Professionals: Ontario (referred to as AAHP:O) or the Ontario Public Services Employees Union (referred to as OPSEU) would represent the employees in the following bargaining unit:

all paramedical employees of the Perth and Smiths Falls District Hospital, save and except supervisors and persons above the rank of supervisor.

3. The Board also directed that a representation vote be held to determine whether OPSEU, the Canadian Union of Public Employees, Local 2119 (referred to as CUPE) or the Independent Canadian Transit Union, Local 6 (referred to as ICTU) would represent the employees in the following bargaining unit:

all employees of the Perth and Smiths Falls Hospital, save and except supervisors, those above the rank of supervisor, professional and medical staff, registered, graduate nurses and undergraduate nurses, graduate and student dietitians, paramedical employees, the Secretary to the Administrator, the Secretary to the Business Manager, the Secretary to the Director of Nursing, students employed during the school vacation period and employees covered by the collective agreement with the Canadian Union of Operating Engineers and the Independent Canadian Transit Union at Smiths Falls.

Prior to the vote taking place ICTU withdrew from the ballot.

4. In an earlier decision dated October 13, 1995 the Board (differently constituted) declared that a sale of a business occurred when the Smiths Falls Community Hospital and the Great War Memorial Hospital of Perth District merged to become the Perth and Smiths Falls District Hospital. However, in that decision the Board found that as of the date of that hearing the applicant had failed to demonstrate that sufficient intermingling of employees had occurred or would occur to warrant the direction of a representation vote. The applicant has now proceeded further with respect to the merger of the hospitals and renews its request that a vote be directed in each of two combined bargaining units, a service/office/clerical unit and paramedical unit. The applicant also filed a request for reconsideration of the Board's October 1995 decision but that request was withdrawn prior to the commencement of this hearing.

5. The Board heard many days of evidence and argument with respect to this application and determined that intermingling had occurred which warranted the merger of the bargaining units and the

holding of representation votes as described above. The following are the reasons for the Board's "bottom line" decision of March 20, 1997.

The Facts

6. The relevant facts are as follows. The Perth and Smiths Falls District Hospital operates out of three physical plants. There is a North Unit and a South Unit in Smiths Falls which together were formerly the Smiths Falls District Hospital. There is also a site in Perth which was formerly the location of the Great War Memorial Hospital of Perth. The Perth site and the North Unit in Smiths Falls are twenty-two kilometres apart. The hospital is closing the South Unit at Smiths Falls. It hopes to redevelop the North Unit but has not yet received approval from the Ministry of Health. In the meantime, the services offered at the South Unit are being transferred to the North Unit and to Perth.

7. Both the Perth and Smiths Falls sites maintain active treatment facilities. The Perth site is comprised of a 24-hour emergency room service, operating room and recovery room services, special care services, medical and surgical and long-term care and rehabilitation services. The Smiths Falls site consists of 24-hour emergency services, operating room and recovery room services, obstetrical services, medical/surgical services, special care services and long-term care.

8. The management of the hospital has been fully integrated. There is a manager for each service covering both sites, as well as a manager for each treatment department, i.e. there is one patient care manager for the emergency rooms at both sites, one patient care manager for medical/surgical at both sites, etc.

9. At the time of the merger, CUPE represented full-time and part-time "service" bargaining units at the Smiths Falls site. OPSEU represented full-time and part-time "clerical" units and full-time and part-time "service" units at the Perth site. It is OPSEU's position that the four bargaining units are in fact a single bargaining unit even though they were certified separately. It appears that the collective agreement negotiations are conducted jointly although separate seniority lists continue to be maintained. ICTU represents a unit of full-time stationary engineers and maintenance workers at the Perth site as well as a unit of full and part-time stationary engineers at the Smiths Falls site. However, the hospital withdrew its application with respect to ICTU's bargaining unit at Smiths Falls. Subsequent to the official incorporation of the new hospital on March 31, 1995 OPSEU organized a bargaining unit of paramedical employees including both full-time and part-time workers at the Perth site and AAHP:O organized a bargaining unit of full-time and part-time paramedical employees at the Smiths Falls site. AAHP:O also represents laboratory staff at the Perth site as a result of a "sale of business" in acquiring the laboratory (see paragraph 19 below). There are therefore four unions representing either seven or ten bargaining units (depending on how OPSEU's units are characterized) involved in this application. There are approximately five hundred and twenty employees in those bargaining units.

10. The Canadian Union of Operating Engineers also represents a bargaining unit of stationary engineers. However, the application against that union was withdrawn at the outset of the hearing. The Ontario Nurses Association represents a merged bargaining unit of registered and graduate nurses at both sites.

11. There is also a group of non-union clerical employees at the Smiths Falls site who have intervened in this application.

12. The scope clause in the OPSEU collective agreement for two of its bargaining units, the ICTU collective agreement and the bargaining unit description in the certificate for the OPSEU paramedical unit describe representation rights in the Town of Perth. The scope clause for the other two OPSEU bargaining units do not refer specifically to the Town of Perth. The scope clause in the CUPE

collective agreement and in the AAHP:O certificate describe representation rights in the Town of Smiths Falls.

13. The OPSEU, CUPE and ICTU collective agreements have all expired and not yet been renegotiated. The OPSEU paramedical unit and AAHP:O have both yet to negotiate their first collective agreements.

14. The history of the merger of the two hospitals up to July, 1995 is set out in the Board's decision dated October 13, 1995 and will not be repeated here. However, one of the matters not dealt with in that proceeding was the effect, if any, of the application for certification filed by AAHP:O on May 17, 1995. The parties agreed to adjourn that certification proceeding pending the outcome of the hospital's application. AAHP:O had intervenor status in those proceedings. On November 20, 1995 AAHP:O was certified as the bargaining agent for "all paramedical employees of Perth and Smiths Falls District Hospital in the Town of Smiths Falls."

The July 8, 1996 Agreement

15. On April 10, 1996 AAHP:O applied to represent the paramedical employees represented by OPSEU at the Perth site. A vote was held and AAHP:O was unsuccessful.

16. Three employees, a physiotherapist, a speech pathologist and an occupational therapist who were hired at the Smiths Falls site but rotated to the Perth site were excluded from the vote at Perth. AAHP:O subsequently took the position that the three individuals were not represented by any bargaining agent and applied to represent them. OPSEU objected and claimed that they were in the OPSEU bargaining unit. The parties reached a settlement on July 8, 1996 which provides as follows:

Board File #3616-94-R
0452-96-R

BETWEEN:

Association of Allied Health Professionals: Ontario

and

Ontario Public Service Employees Union

and

Perth and Smiths Falls District Hospital

MINUTES OF SETTLEMENT

The parties agree to the following terms as full and final settlement of all outstanding issues between them in the above matters:

(1) The parties agree that Physiotherapists employed at the Smiths Falls site may be assigned on a rotational basis to work at the Perth site on a temporary basis and that when so assigned will continue to be part of the AAHP:O bargaining unit;

(2) The parties agree that the Speech Language Pathologist employed at the Perth site when assigned to work at the Smiths Falls site on a part time basis will continue to be part of the OPSEU paramedical bargaining unit;

(3) The parties agree that the Occupational Therapist employed at the Perth site is part of the OPSEU paramedical bargaining unit;

(4) The parties agree that the description of the AAHP:O bargaining unit will be amended to provide that it applies to employees working in or out of Smiths Falls and that the description of the OPSEU paramedical bargaining unit will be amended to provide that it applies to employees working in or out of Perth;

(5) AAHP:O hereby seeks leave of the Board to withdraw its application in Board File #0452-96-R.

DATED AT TORONTO THIS 8TH DAY OF JULY, 1996

"Illegible Signature"

AAHP:O

"Illegible Signature"

OPSEU

"Shirley Rogers" - H. R. Manager

Perth and Smiths Falls District Hospital

17. On July 16, OPSEU's job security officer, Mr. Roger Haley, wrote to the hospital outlining his understanding of the settlement as follows:

RE: Transfer of South Unit Site Staff to Perth

I find it regrettable that you either choose to ignore OPSEU's proposals or simply do not understand them when we spoke on June 19, 1996 in Perth concerning the movement of beds from the hospital's Smiths Falls site to Perth. And it is becoming increasingly frustrating to continuously waste the time and effort at the Labour Board for OPSEU to make its case clear.

Since your letter of July 10, 1996 to Mr. McNicol is far removed from our earlier discussions, let me try to explain it to you one more time.

On June 19, 1996 I suggested to you that a formal transfer agreement was not absolutely necessary. Collective agreements already exist which provide for the filling of vacancies at both sites. Again; simply put; if additional staff are required at Perth when the beds are transferred, post those vacancies in accordance with the OPSEU collective agreement. If vacancies still exist after that two week process then restrict the search of applicants to those who may be interested from the Smiths Falls unit.

OPSEU also proposed that any Smiths Falls employees who chose to transfer during this process would receive the salary level on the OPSEU salary grid closest to their former pay at Smiths Falls and also retain the recognition of service for the purposes of vacations, pensions and benefits. However seniority could not be recognized for the purposes of layoff, recall, promotions, etc.

The Memorandum of Agreement that you signed along with OPSEU and Allied Health on July 8, 1996 at the OLRB allows for the movement of three (3) occupations only between those bargaining units. *It does not give the hospital the free will to move everyone in all bargaining units. It relates only to those three positions in question before the Board at the time.* I am hearing that some managers at the hospital incorrectly believe that this Agreement pertains to all operations. It is however somewhat ironic to see the hospital agree to this movement and retention of bargaining unit rights in this scenario while it has been rejected as initially proposed by OPSEU for the past two years.

I trust that the hospital will clearly understand OPSEU's position at this time; ... *all vacancies must be posted within the provisions of the collective agreements.* Any variations in that process without the agreement of all parties will be followed up accordingly.

[emphasis in original]

18. AAHP:O and the hospital both understand the settlement to mean that the scope of the paramedical bargaining units are amended to permit paramedical employees to work at either location while remaining covered by the terms and conditions of employment contained in the collective agreement (when there is one) for their original unit. The above letter from Mr. Haley was not

withdrawn or clarified prior to the hearing. OPSEU's witnesses' testimony with respect to their view of the settlement was somewhat confusing and even contradictory at times. However, Mr. Haley did concede that his understanding of the agreement outlined in the above letter had been incorrect. OPSEU's counsel set out OPSEU's current position with respect to the settlement in a letter to AAHP:O's counsel as follows:

Re: Perth & Smith Falls District Hospital v. O.P.S.E.U., CUPE, AAHP, ICTU, CUOE

Great War Memorial Hospital of Perth District, Smith Falls Community Hospital v. O.P.S.E.U., CUPE, Local 2119, Independent Canadian Transit Union and its Local 6 v. Non-Union Employees, Smith Falls Community Hospital, ONA, AAHP

Board File No's 1774-96-R and 3824-94-R

Thank you for your letter of January 6, 1997.

The Ontario Public Service Employees Union's (OPSEU) position with respect to the July 8th, 1996 settlement is that this settlement deals with 3 positions of Speech Pathologist, Occupational Therapist and Physiotherapist and that OPSEU reserves the right to object to the Hospital's movement of other members in or out of the paramedical unit in Perth. However, OPSEU also acknowledges that if the Hospital does properly move persons in other occupations with the paramedical unit, bargaining rights for such persons will be governed by paragraph 4 of the July 8th agreement.

Mr. Hailey's correspondence of July 16, 1996, was in reply to Ms. Rogers letter of June 10, 1996, which appeared to indicate that she was relying on the agreement of July 8, 1996 to transfer nursing staff from the South Unit in Smith Falls to Perth. It is OPSEU's position that the July 8th, 1996 settlement dealt only with the paramedical unit and not the nursing unit.

I trust that this provides the requested clarification.

Laboratory Services

19. The two original hospitals each had separate laboratories. Smiths Falls operated its own lab and Perth contracted for the service. After the merger, the hospital purchased a laboratory programme. It became operational at both sites on April 1, 1996. In a memorandum of agreement dated March 22, 1996 the hospital and AAHP:O agreed that the hospital would recognize AAHP:O as the representative of the laboratory employees transferred from the lab contractor as a result of the "sale of a business". As a result AAHP:O represents lab employees at both hospitals but in different bargaining units. The hospital advised AAHP:O that it intended to transfer staff between sites and subsequently did so on eight occasions in the summer of 1996. In August, 1996 the hospital prepared a Master Rotation for the laboratory staff at both sites.

20. The rationalization study with respect to the two hospitals had been completed and released prior to the Board's October, 1995 decision. However, on April 1, 2, and 3, 1996 the detailed re-engineering recommendations were released to staff in the Nursing, Housekeeping, Maintenance and Rehabilitation Services.

Housekeeping and Maintenance Services

21. The hospital's plan with respect to the Housekeeping and Maintenance Services, as set out in the re-engineering recommendations and Ms. Rogers' evidence, is to merge the housekeeping and maintenance/physical plant departments of both sites into a new department for the entire hospital called Environmental Support Services. The contract with VERSA services which had been providing management of the maintenance department at Perth was cancelled in May, 1996 and a manager for the combined service, Paul Simpson, was selected.

22. The stationary engineer 4th class position at the Perth site will be eliminated. New job classifications for this department will replace all of the the current housekeeping and maintenance positions. The other positions in the OPSEU, ICTU and CUPE bargaining units to be eliminated are housekeeping aide, heavy cleaner, skilled maintenance, maintenance porter, electrician, laundry foreman and seamstress. They will be replaced with the positions of environmental assistant I and II and environmental technician-electrical. Job descriptions for the new positions have been drafted. However, meetings with the unions with respect to the job descriptions were scheduled to take place during this hearing and were therefore cancelled. One of the documents submitted suggests that there will be some lay-offs in the CUPE unit as a result of this re-engineering plan combined with the closure of the South Unit. The evidence was not clear whether there would be lay-offs in any of the other bargaining units. When the detailed re-engineering of this department was announced in April, 1996 the hospital indicated it would be implemented in eighteen to twenty-four months. Ms. Rogers testified that the unit assistants, (see Nursing Re-engineering below), the environmental technicians 1 and 2 and the environmental technician-electrical were to be implemented by the end of March 1997.

23. The hospital has indicated its intention, both through Ms. Rogers' evidence and in the recommendations in the Rationalization Study, that the employees in Environmental Support Services are to provide the service to all three sites. The Rationalization Study gives an example of needing to use the environmental technicians as a team to periodically strip and wax floors at both sites.

24. The linen inventory control function will be transferred to the Material Management Department. One employee will work for three hours per day at each of the Perth site and the Smiths Falls site to perform the linen inventory control function. It is intended that the employee who has been performing the linen inventory control function continue to do so under the new environment. He is in the CUPE bargaining unit. Ms. Rogers testified that this position would arguably fall within the ICTU or the OPSEU bargaining unit at Perth.

The Day Hospital

25. The Day Hospital Service is offered at the Smiths Falls site, South Unit and is to be moved to Perth as part of the South Unit closure. It employs a non-bargaining unit coordinator and a full-time day hospital assistant who is in the AAHP:O unit. It receives other services from other departments including occupational therapy, physiotherapy, speech pathology and nutrition.

26. On May 13, 1996, AAHP:O filed a jurisdictional dispute application claiming that its work was being assigned to CUPE members. On the same date it also filed an application alleging a violation of the statutory freeze.

27. In October, 1996, the above applications were resolved on the basis that Madeline Forrest, the day hospital assistant, would be transferred with the Day Hospital to Perth and would remain in the AAHP:O bargaining unit. The parties also agreed that Vicki Craig, the part-time pharmacy technician, would be transferred to Perth but would remain in the AAHP:O bargaining unit. OPSEU was not given notice of either the applications or the settlement. Ms. Rogers testified that it was her view that this agreement was in keeping with the agreement reached on July 8, 1996 between the hospital, AAHP:O and OPSEU.

Rehabilitation Services

28. Currently both inpatient and outpatient physiotherapy, occupational therapy and speech language pathology services are offered at both sites. The hospital plans to locate the Rehabilitation Inpatient Unit, Rehabilitation Therapies and the Day Hospital Programme (as noted above) to Perth by the end of March 1997. Outpatient therapy services will continue to be offered at Smiths Falls. The

hospital anticipates that these re-engineering changes will result in an increase of physiotherapy hours at Perth and a decrease at Smiths Falls. Physiotherapists working in Perth will continue to be in the AAHP:O bargaining unit. The hospital considers this to be consistent with the July 8, 1996 agreement.

The Nursing Department

29. The hospital is reorganizing the nursing department. One of the changes is to implement the position of "unit assistant" in each Patient Care Unit at each site. The unit assistant will perform housekeeping functions formerly performed by housekeeping aides and will assume the non-nursing functions currently carried out by registered nurses (RN's) and registered practical nurses (RPN's). This will result in a total of 29,049 hours being transferred from the housekeeping department to the nursing department. The hospital anticipates the necessity to transfer unit assistants between units and between sites to cover vacations, sick leave etc.

The Chronic Care Unit

30. On May 14, 1996 the hospital formally announced the steps it would be taking to close the Chronic Inpatient Unit at the Smiths Falls South Unit. Ten chronic care beds were to be transferred to Perth. Subsequently it was decided that seven more patients qualified for chronic care and were to be transferred to Perth as well. However, these further seven patients will be placed into existing medical/surgical beds at Perth and transferred to chronic care beds as they become available. The staff assigned to those patients are in the OPSEU bargaining unit. The ten beds originally scheduled for transfer by the hospital will also be set up on the medical/surgical unit at Perth but will house only the Smiths Falls chronic care patients. The hospital is transferring the staff with these beds and therefore two full-time and eleven part-time RPN's were transferred with the beds on January 13, 1997. The hospital's intention to transfer the staff with the beds was communicated to the parties in its documents relating to the closure, through its committees and in its announcement on May 14. The hospital continues to recognize CUPE as the bargaining agent of the nurses who were transferred along with the chronic care beds to Perth. Ms. Rogers explained that the hospital transferred the staff with the beds to maintain the continuity of care of these chronic patients, some of whom may be patients of the hospital for a year or more, and because it was the work of the chronic care staff that was being transferred.

31. It was not originally the hospital's intention to assign housekeeping staff from the CUPE bargaining unit at Smiths Falls to Perth along with the chronic care beds. However CUPE filed five grievances with respect to that decision. Two grievances were allowed and a regular full-time CUPE housekeeping aide position will be transferred to the Perth site. According to CUPE's pleadings, the work of its heavy cleaner will be performed by an OPSEU member. No dietary service employees will be transferred with the chronic care beds so that work will be performed by someone outside the CUPE bargaining unit. CUPE therefore is proceeding with three grievances with respect to those positions.

32. The hospital's eventual plan is to redevelop the North Unit and to relocate the chronic care beds there. It has submitted plans to this effect to the Ministry of Health for approval but there is as yet no firm timetable and the hospital acknowledged it could take many years to complete.

33. It appears that the timing of this application was dictated by the hospital's decision to transfer the chronic care beds and staff in January, 1997 as well as by the implementation of the re-engineering recommendations in maintenance, housekeeping and rehabilitation services. The hospital anticipates that the implementation of all of those initiatives will require intermingling. The hospital was also motivated by its expectation that its budget would be cut a further million dollars in the next fiscal year.

Pharmacy Services

34. The hospital was unable to implement its re-engineering plans with respect to the pharmacy until a new pharmacy manager was hired in mid-October, 1996. The hospital is now consolidating the pharmacies but will continue to operate a pharmacy at both Perth and Smiths Falls. However, the Smiths Falls pharmacy will be a satellite and the stock kept there will be substantially reduced. The pharmacy at the Perth site was staffed at the time of the hearing by a full-time nurse manager and a part-time office clerk. The pharmacy at Smiths Falls was staffed by a full-time pharmacy technician, a part-time pharmacy technician and a casual relief technician. The full-time nurse manager position at Perth was to be eliminated on February 1, 1997 and the Perth site was to be staffed by two full-time-equivalent pharmacy technicians and the Smiths Falls site by one full-time pharmacy technician. The part-time pharmacy technician from Smiths Falls is to be transferred to Perth at the completion of this project.

35. The pharmacy technicians at the Smiths Falls site fall within the AAHP:O bargaining unit. The part-time clerical position at Perth was in the OPSEU clerical unit. In Ms. Rogers' opinion the pharmacy technician positions at Perth will fall within the OPSEU paramedical bargaining unit. However, the part-time pharmacy technician, Vicki Craig, who will be transferred from Smiths Falls to Perth will continue to be in the AAHP:O bargaining unit. This is in keeping with the settlement between AAHP:O and the hospital described at paragraph 27.

Dietary and Nutrition Services

36. The hospital plans to reorganize its dietary and nutrition services but is in the very early stages of that process. It has not yet decided whether to provide the service "in-house" or to contract it out. At present, dietary services are provided in-house at Smiths Falls by CUPE and AAHP:O members but they are contracted out in Perth. At the Perth site, the employees of the contracting agency are members of an OPSEU bargaining unit.

37. There are nine employees who were permitted to become part-time employees of both hospitals in 1994 and are therefore represented by both unions. The hospital agreed to this, according to Ms. Rogers, because it fully expected the parties to reach a transfer agreement and because it was consistent with its policy of optimizing the use of staff between sites. It appears that this was a continuation of a situation which arose when the hospital was two separate entities and some employees worked part-time or casual at both. When it became apparent that the parties would not be able to reach a transfer agreement, the hospital stopped the practice but it allowed the employees in this situation to continue to work and maintain their seniority in both bargaining units. Ms. Rogers testified that this has led to a situation in which both CUPE and OPSEU have filed grievances with respect to an employee who was disciplined. This situation has also led to confusion about the status of an employee who is eligible for early retirement in one bargaining unit but not the other. The CUPE president is also one of these anomalous employees and as a result she is paid for committee work she performs as CUPE president when she is scheduled at Smiths Falls but must take an unpaid leave of absence if meetings are held while she is scheduled at Perth.

38. The hospital put up a posting at Smiths Falls for a casual position located at Perth. However, employees were told they would have to give up their positions at Smiths Falls if they applied. CUPE filed a grievance with respect to this stance and relied on the hospital's past practice of allowing employees to be members of both bargaining units. That grievance was referred to arbitration and is presently in abeyance.

Negotiating History

39. The parties (with the exception of AAHP:O which had not yet been certified) attempted to negotiate a transfer agreement with respect to the hospital merger from April to October 1994. The hospital was proposing a total merger of “seniority” for all employees including the non-unionized group. OPSEU was proposing that the seniority of transferred employees from another bargaining unit be recognized after two years and that there be no seniority recognized for non-union employees. The parties were unable to reach an agreement based on either of these suggestions and in September, 1994 CUPE filed an application under section 64 (now section 69) of the Act seeking a representation vote. That application was withdrawn in January 1995 and the hospital filed the application that led to the Board’s October, 1995 decision. There has been very little negotiating activity since that time. However, OPSEU proposed transfer agreements on a number of occasions which all of the other parties, except ICTU, rejected. There was very little actual negotiation between the parties and the other parties usually indicated their lack of interest in OPSEU’s proposals by ignoring them.

40. In July, 1994 OPSEU proposed an agreement to the hospital. The agreement provided, among other things, that the hospital would recognize OPSEU as the bargaining agent of the employees at Perth and would recognize and comply with the “home” collective agreements of all bargaining unit employees. If any vacancies occur, employees from the other site who are scheduled to become redundant would be entitled to fill them after the job posting provisions of the collective agreement where the vacancy occurs had been exhausted. Employees thus transferred from the other site would not have their seniority recognized initially, but after two years their full seniority would be recognized. Any employee permanently transferred to the other site would be covered by the terms of that site’s collective agreement except that he or she would still be entitled to any superior benefits from the original collective agreement. Integrated seniority lists would be created and would become effective twenty-four months after the date of the signing of the memorandum.

41. On January 27, 1995 OPSEU proposed an agreement to the hospital, CUPE and ICTU which contained much the same terms as the July, 1994 agreement except that it also specifically prohibited anyone from outside the bargaining unit from performing bargaining unit work and it no longer contained the provision for integrating the seniority list after two years. As a result, any employees transferred after the job posting provisions had been exhausted would have their full seniority recognized. The agreement also proposed that after the unionized employees had had an opportunity to be placed in the positions, non-union employees facing lay-off would also have the opportunity. However, seniority (but not service) would only start to accrue for them after being placed in the bargaining unit position.

42. On January 5, 1996, after the Board’s October, 1995 decision, OPSEU proposed an agreement to the other unions (this time including AAHP:O). This agreement was essentially the same as the January, 1995 agreement. There was some evidence that CUPE’s representative indicated to OPSEU that the agreement was acceptable in principle, but that it was ultimately rejected by the CUPE local.

43. Mr. William McNicol, OPSEU’s Local President, advised the hospital president, Ms. Manley, on one occasion that if the hospital could provide a definite date as to when the chronic care beds would return to Smiths Falls, OPSEU might be able to accept the CUPE members being transferred with the beds. Ms. Manley did not provide him with a date and the hospital still does not know when the renovations to the North Unit will occur.

44. On June 19, 1996, OPSEU’s representative, Mr. Haley, met with Ms. Rogers to attempt to negotiate the January 1996 transfer agreement proposal. However the provision recognizing seniority accrued in the other bargaining unit had been removed as that provision had been rejected by the

OPSEU membership. The hospital rejected the agreement. Mr. Haley then suggested verbally that no transfer agreement was necessary. He proposed instead that the hospital post the South Unit positions to be transferred to Perth in the OPSEU bargaining unit. He claimed that it was likely that after the OPSEU members who were interested applied there would still be part-time positions left for some of the laid off CUPE members. The CUPE members would have their service but not their seniority recognized for two years. Ms. Rogers discussed the proposal with the hospital's counsel and then sent Mr. McNicol a letter indicating the hospital would proceed with transferring the staff to Perth as it had planned. Mr. Haley responded with the letter found at paragraph 17 above.

45. OPSEU's witnesses testified that Ms. Rogers had indicated that she did not want to enter into OPSEU's proposed transfer agreements because it would prevent the hospital from returning to the Board to seek a representation vote. Ms. Rogers did not specifically remember such a conversation but essentially agreed that that was a factor the hospital considered.

Evidence of Intermingling

46. At the outset of the hearing, the Board indicated that as the situation continued to evolve it would permit the parties to introduce evidence of "intermingling" which occurred up to the first day of hearing. The Board also advised that it would permit the parties to introduce evidence relating to their future plans with respect to changes at the hospital.

47. Ms. Rogers testified that prior to the first Board decision the hospital tried not to "intermingle" employees because it was bargaining with the unions and because it had already received a grievance. It expected the Board's decision to resolve the situation quickly. However, after receiving and reviewing the Board's October 13, 1995 decision, it was the hospital's view that it was entitled to move employees between sites for legitimate business reasons which Ms. Rogers testified included; vacation relief, avoidance of paying over-time, sick leave relief, covering any kinds of leaves of absences and transfers of programmes and services. As a result, the applicant alleges that the following examples of "intermingling" which affect the responding parties have occurred since the Board's decision in October 1995;

- 1) Leslie Morgan, laboratory technologist (AAHP:O/Smiths Falls) worked at Perth (AAHP:O/Perth) on July 16, 1996.
- 2) Krista Simmons, laboratory technologist (AAHP:O/Smiths Falls) worked at Perth (AAHP:O/Perth).
- 3) Pam Burns, laboratory technologist (AAHP:O/Perth) worked at Smiths Falls (AAHP:O/Smiths Falls) on September 23 and 27, 1996.
- 4) Kim Kehoe, laboratory technologist (AAHP:O/Perth) worked at the Smith Falls site (AAHP:O/Smith Falls) on September 26, 1996.
- 5) Candace Plotz, pharmacy assistant (AAHP:O/ Smith Falls-check) worked at Perth (AAHP:O/Perth or OPSEU/Perth) on Sept. 23, 24 and 25, 1996.
- 6) Esther Barker, speech pathologist (AAHP:O/Smiths Falls) replaced a speech pathologist in the OPSEU paramedical bargaining unit at the Perth site on July 29, 31, August 1, 5, 6, 12, 14, 15, 1996.
- 7) Cindy Neville, ultrasound technologist (OPSEU/Paramedical) worked at Smiths Falls on September 17, 1996 for four hours.
- 8) Joanne Gilbert, physiotherapist (AAHP:O/Smiths Falls) worked regularly at the Perth site.

- 9) Marjorie Billings, patient registration clerk, (OPSEU/clerical) worked at Smiths Falls site (non-union) on October 7 and 14, and November 12 and 17, 1996.
- 10) Jean Larocque, RPN (CUPE) worked at the Perth site (OPSEU/service) on September 15, 1996. Mr. McNicol testified that his wife called and advised she had arranged to cover the shift for the scheduled RPN who was not available but she was told that someone else had already been assigned.
- 11) Sharon Newans, RPN (CUPE) worked at Perth site (OPSEU/service) on September 24 and 28, November 10, 16, 24 1996.
- 12) Greg Cushing, RPN (OPSEU/service) worked at Smiths Falls (CUPE) on June 28, 1996.
- 13) Constance Cross, seamstress (CUPE) worked at Smiths Falls on February 9 and June 11, 1996.
- 14) Tom Okaguchi, laundry foreman (CUPE) worked at Perth on Jan. 14, 15, 16, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, February 3, 4, 11, 12, 13, 17, 18, 24, 25, 28, 29, March 28, August 26, 27, Sept. 26 and Nov. 5, 7, 9, 11, 13, 15, 18, 20, 21, 22, 25, 26 and 29, 1996. OPSEU denies that Mr. Okaguchi was performing work of its bargaining unit on the specified dates.
- 15) Gary Lackey, maintenance II (ICTU/Perth) worked at the Smith Falls site (CUPE) on September 11, 13, 18, 19 and October 8, 1996.
- 16) Mike Girdwood, CSR (OPSEU/Perth) worked at Smiths Falls on March 21, 22 and 23, 1996. CUPE filed a grievance which was withdrawn after investigation disclosed that work Mr. Girdwood was performing was not CUPE bargaining unit work. Mr. Girdwood had been a CUPE member who applied for the posted CSR job at Perth. When he took the job he had to give up his CUPE seniority.
- 17) Sheila Paul, dictatypist (OPSEU/clerical) worked at Smiths Falls (non-union) on October 22 and 24.
- 18) Judy Saunders, switchboard operator (OPSEU/clerical) worked at Smiths Falls (non-union) on October 27, 1996.
- 19) Sue McLellan, stores clerk (OPSEU/clerical) worked at Smiths Falls (non-union) on October 8, 9, 10, 15 and 16, 1996. She also did computer training at Smiths Falls on April 30, May 8, 14, 15, 17, 22.
- 20) Nancy Roberts, stores clerk (Smith Falls/ non-union) worked at the Perth site (OPSEU) on January 16, 31, February 14, 28, April 24, May 29 and July 3, 1996.
- 21) Greg Patterson, lead hand/heavy cleaner, (CUPE) worked at the Perth site on July 18, 20, 21, Dec. 1, 11, 1995 and Jan. 9, 23, 31, July 23, August 22, September 12, 1996 and October 4, 1996. OPSEU denies that Mr. Patterson was doing the work of its bargaining unit on the specified dates.
- 22) Diana Shackleton and Verna Evoy, housekeeping aides, (CUPE) both worked at the Perth site on December 6, 1995 for two hours. OPSEU denies that the individuals were performing the work of its bargaining unit on December 6, 1995.
- 23) Debbie Hart, housekeeping aide (CUPE) commenced training for a CSR (Central Supply and Receiving) Aide at the Perth site on October 8, 1996. She will assume a CSR-OR position at Smiths Falls upon completion of her training.
- 24) Erma Findlay, CSR aide (OPSEU/service) worked at Smiths Falls (CUPE) on November 5, 1996.
- 25) Fred Kelly is a licensed electrician in the CUPE bargaining unit. He is the only licensed

electrician employed by the hospital and has therefore worked on numerous occasions at the Perth site. ICTU does not have a licensed electrician in its bargaining unit and does not claim that the work being performed by Mr. Kelly at Perth is work of its bargaining unit. OPSEU has also not made such a claim.

- 26) Cecil Ferguson, truck driver (CUPE) performs truck driving services for all three sites and distributes mail, CSR materials and laundry between them.
- 27) There has been an increase in the need for physiotherapy services at Perth attributable to the fact that 75% of surgery and all orthopaedic surgery is performed there and rehabilitation services have been relocated there. As a result physiotherapists from Smith Falls (AAHP:O) have been working increased hours at Perth.

GRIEVANCES

48. At least nineteen grievances have been filed since July 1995, as a result of perceived problems with the assignment of work between bargaining units. Many of the grievances have been resolved but some are outstanding and are in abeyance pending the outcome of this application. Only one of the nineteen grievances involves a complaint that a paramedical employee is doing the work of someone in another bargaining unit. OPSEU has filed a grievance with respect to the pharmacy technician from AAHP:O working at Perth. There is no pharmacy technician in the existing OPSEU agreements but the pharmacy clerk was in the OPSEU clerical unit. There are no paramedical collective agreements so it has not been possible to file any other such grievances. The fact that no paramedical grievances have been filed may also reflect the parties agreement of July 8, 1996.

49. On each of February 21, 22 and 23 1996, CUPE filed a grievance complaining about OPSEU members performing work of the CUPE bargaining unit. These grievances were withdrawn.

50. On June 21 and June 22, 1996 CUPE filed three policy grievances with respect to the assignment of work. The grievances were subsequently withdrawn.

51. On July 2, 1996 CUPE filed one policy and two individual grievances when Greg Cushing RPN (OPSEU) worked at the Smiths Falls site. The grievances have been referred to arbitration.

52. On July 24, 1996 CUPE filed one policy grievance and two individual grievances objecting to the lay-off of staff and the "contracting out" of dietary services as a result of the South Unit closure and movement of beds to Perth.

53. On August 20 and 21, 1996 CUPE filed four individual grievances and one policy grievance alleging that OPSEU would be doing work of its bargaining unit in relation to the transfer of beds to Perth. Two grievances were settled and withdrawn.

54. On September 12, 1996 Mr. McNicol filed a policy grievance with respect to Ms. Jean LaRocque RPN (CUPE) working at the Perth site on September 15, 1997.

55. On September 16, 1996 CUPE filed a policy grievance complaining that a member of ICTU was performing the work of its bargaining unit.

56. On September 26, 1996 OPSEU filed a grievance with respect to Candace Plotz working as a pharmacy technician at Perth. The hospital believes this situation is covered by the July 8, agreement. OPSEU disagrees.

Other Labour Relations Difficulties

57. Ms. Rogers testified about other labour relations problems that the hospital was experiencing as a result of the present bargaining unit structure. She explained that the present situation causes problems with recruitment. Currently, postings for vacancies are posted at all three sites. Any employee may apply but preference must be given to members of the bargaining unit whose collective agreement it is posted under. Therefore, an RPN position in the OPSEU bargaining unit would go to an RPN in that bargaining unit instead of to an RPN in the CUPE unit who has more service/experience but no seniority in the OPSEU bargaining unit. If the applicant from the other site is appointed to the job she or he must give up all of his or her seniority to take it. Ms. Rogers testified that this is a disincentive to employees to transfer, and from a recruitment perspective did not allow the hospital to obtain the most qualified candidates for the position. Ms. Rogers testified that the present structure caused labour relations problems because the most junior employee is not necessarily the one laid off as a result of the separate bargaining structure. She noted that with the closure of the South Unit “junior” RPN’s at Perth have retained their position and more “senior” RPN’s at Smiths Falls have been displaced or have bumped into lower classifications such as housekeeping or dietary. Ms. Rogers indicated that this situation concerned the hospital as it was losing the employees with the most experience and that is not the most optimal use of resources.

58. The hospital is also concerned that the present structures result in inflexible staffing. The hospital intends to transfer staff between sites for legitimate business purposes but in the present situation every occurrence could lead to a grievance alleging a member of the other bargaining unit is performing the work or a failure to post the position. If the hospital is restricted from transferring and intermingling staff it leads to costs for the hospital.

59. Ms. Rogers also testified that it was difficult to develop a new “culture” reflective of the now merged hospital when the bargaining units remain site specific. Staff will not get to know each other unless they are working side by side.

60. Ms. Rogers also perceives it to be a problem that on all of the hospital’s multi-party committees there are two unions representing the same classifications of employees with potentially conflicting interests.

The Nature of the Evidence

61. The hospital called one witness, CUPE called two and OPSEU called two. Many documents were also tendered, including the studies and plans supporting the restructuring and re-engineering of the hospital and numerous e-mails sent to the hospital’s witness, Ms. Rogers, from the managers advising of transfers of employees from one site or bargaining unit or the other and the reason for those transfers. The hospital also submitted notes written by the electrician, some shift schedules and some travel expense forms.

Submissions of the Parties

62. At the outset of its submissions the applicant suggested five issues upon which the Board would have to make determinations:

- 1) Whether intermingling within the meaning of section 69(6) of the *Labour Relations Act* had occurred.
- 2) If such intermingling has occurred, ought the Board to exercise its discretion, in particular under section 69(6)(b)?

- 3) What are the appropriate bargaining units?
- 4) Should the Board order a representation vote to determine who will represent the employees in the bargaining units?
- 5) What weight ought the Board to give to certain documents that were the subject of objections?

63. The hospital argues that the re-engineering subsequent to the merger is close to completion. Any aspects that have not been completed are certain enough for the Board to rely upon. It claims that intermingling within the meaning of the Act has now definitely occurred and it refers to concrete examples, as well as to specific re-engineering initiatives which it claims require the movement of staff between sites. It asserts that it is necessary for it to have complete flexibility with respect to intermingling employees in order to meet the mandate of the hospital reorganization.

64. The hospital also argues that the Board should exercise the discretion set out in 69 (6)(a) to (d) because of the labour relations difficulties raised by the current bargaining unit structure. The hospital claims that the bargaining structure prevents it from recruiting the most qualified (which it equates with most long-term) employee, for a position. Furthermore, when lay-offs occur “junior” employees are retained while more senior ones lose their jobs. That leads to higher severance costs and the result that the most qualified employees do not remain employed. The hospital also cited the number of grievances that have been filed as a result of the current bargaining unit structures. The hospital asserts that the evidence demonstrates that the unions have “dug in their heels” and will not allow employees from other bargaining units to do “their work”. The hospital also pointed to the number of applications which have been filed with the Board by various parties. The hospital also cites cost issues inherent in being unable to move employees from one site to another, for example, having to pay overtime to use an employee in a specific bargaining unit. In addition, the hospital claims that the division between unions is detrimental to developing a corporate identity. The hospital also referred to the problem of the employees with dual union membership. It claims that the parties have demonstrated an inability to negotiate a workable solution.

65. The hospital submits that the Board ought to combine the bargaining units into two bargaining units, a paramedical unit and a service/clerical unit, both of which would cover both locations. It argues further that the positions in dispute between AAHP:O and OPSEU belong in the paramedical bargaining unit. The hospital asserts that a representation vote should be held pursuant to section 69(8) of the Act in the paramedical bargaining unit between AAHP:O and OPSEU and in the service/maintenance/clerical unit between OPSEU, CUPE, ICTU and that there should also be a non-union option to reflect the interests of the non-unionized employees at the Smiths Falls location.

66. The hospital urged the Board to give full weight to the documentary evidence tendered in support of its claim that intermingling had occurred. The hospital referred to its one witness’s role in collecting the disputed e-mails in support of their reliability. It claimed that the documents were generated in the course of business and were therefore acceptable exceptions to the hearsay rule. It also pointed out that OPSEU and ICTU had had notice of the facts of the allegations of intermingling through these documents and had called no evidence to challenge it. The hospital indicated that it was also relying upon time-sheets, travel payment requests, and schedules to prove that individuals worked at one site or the other. It pointed out that the movement of staff outlined in the documents was all in keeping with the re-engineering documents which were reliable. The hospital asserted that if it called every manager to testify as OPSEU and ICTU claim it is required to do, the hearing would not have been completed for a very long time. The hospital noted that even with the limited number of witnesses called the hearing lasted for twenty-two days. The hospital also referred to the Board’s ability under the *Statutory Powers Procedures Act* to admit hearsay evidence. On this issue the hospital relied upon the

following decisions: *Setak Computer Services v. Burroughs Business Machines Ltd. et. al.* 15 O.R. (2d) 750 and *R. v. Smith*, 94 D.L.R.(4th) 590.

67. The hospital claims that the facts of this case are somewhat different from many of the others that the Board has considered in that here, two corporations have ceased to exist and in their dissolution have created a new company. In these circumstances a very broad interpretation of intermingling is warranted. The intention of the section has been met in that employees are working side by side in a business that has become integrated who would not otherwise have been working side by side. The hospital referred the Board to the following decisions: *Caressant Care Nursing Home of Canada Limited*, [1984] OLRB Rep. Aug. 1060; *Royal Ottawa Health Care Group*, [1993] OLRB Rep. July 664. The hospital also referred to the decisions included in CUPE's Book of Authorities (infra at paragraph 83).

68. Mr. Burns submitted on behalf of the non-unionized employees that they should be excluded from the bargaining unit and the vote. He argued that they should not be subjected to mandatory collective bargaining. He was concerned that the non-unionized employees would have to join a union, would have no seniority, and would be subject to bumping.

69. AAHP:O agreed with the hospital that the Board can rely upon the documentary evidence submitted in support of the hospital's allegations of intermingling because they are business records and therefore an exception to the rule against hearsay. On this issue AAHP:O referred the Board to *Reimer Overhead Doors Ltd.*, [1984] OLRB Rep. Oct. 1493.

70. AAHP:O articulated the other issues the Board has to determine as follows:

1. What are the Board's powers under section 69 of the Act?
2. Is there intermingling to the extent that a vote should be ordered?
3. In spite of a finding of intermingling, do the geographic scope clauses with respect to the paramedical units constitute a bar for relief?
4. Does the situation justify a vote under section 69(8) relative to the constituencies on the ballot?
5. If a vote is ordered, what is the bargaining unit and what is the voting constituency?
6. If a vote is ordered what is the date of the list?

71. AAHP:O argues that there is a conflict between the OPSEU and AAHP:O bargaining units which falls within section 69(4)(c) and (d) of the Act. The conflict arises because both unions represent paramedical employees at one location of the employer. It notes that while it may be arguable that the geographic limitations in the scope clauses provide a complete answer, the many proceedings that have taken place between the parties indicate that it is not. In the alternative, AAHP:O argues that the facts fall within the definition of intermingling found at section 69(6) of the Act. AAHP:O asserts that the three paramedical bargaining units (including the lab at Perth) should be combined into one bargaining unit and a vote held between it and OPSEU.

72. AAHP:O argues that the two positions which have been identified as falling within both its bargaining unit and OPSEU's service unit should be included in its unit because they share a community of interest with the other paramedical positions.

73. AAHP:O urges the Board to find that sufficient intermingling has occurred for the Board to order a vote. It argues that intermingling has occurred in two ways: through employee transfers and

through the integration of two businesses or organizations with the result that employees are working side by side.

74. It was argued that the intermingling has given rise to significant labour relations problems which AAHP:O places into two categories; issues that affect the administration and management of the hospital and difficulties that affect both unions' members. A vote, according to AAHP:O would provide the best resolution to these difficulties. It anticipates an escalation of problems if a vote is not held.

75. AAHP:O addressed the jurisprudence found in some of the Board's successorship cases (specifically *Silverwood Dairies*, [1980] OLRB Rep. Oct. 1526) which suggests that there is no intermingling if, as a result of the geographic scope of the bargaining units neither union could ever represent individuals in the other location. However, AAHP:O notes that in this case both unions can claim "accretions" to their bargaining units when paramedical employees are moved from one location to another and refers to the Board's decision in *The Municipality of Metropolitan Toronto*, [1992] OLRB Rep. March 315 which found that the "accretion" analyses did not add anything to the question of whether employees have been intermingled. AAHP:O also notes that the July 8, 1996 agreement amends the scope clauses in the paramedical units and does accord representation rights to both locations. In any case, relying upon discrete bargaining rights will not resolve the ongoing problems. It was also suggested that the *Silverwood Dairies* (*supra*) line of cases were distinguishable in that in those cases the employer had not attempted to integrate the two workplaces completely. These cases are not useful where the employer has integrated the business and is transferring between sites. The Board should craft a response which recognizes the labour relations reality.

76. AAHP:O argued that the situation justifies a vote under section 69(8) because there has been intermingling, there are significant labour relations difficulties and attempts to settle have not resolved the problems. It would not be appropriate to simply appoint a bargaining agent as the two unions both represent a significant percentage of the employees.

77. AAHP:O relies upon the following decisions of the Board: *Caressant Care* (*supra*); *Bermay Corporation Limited*, [1979] OLRB Rep. July 608; *Select Commercial Laundries*, [1991] OLRB Rep. May 691; *Emrick Plastics Inc.*, [1982] OLRB Rep. June 861, as well as a number of decisions in the CUPE Book of Authorities (*infra* at paragraph 83).

78. CUPE adopts the majority of AAHP:O's submissions and elaborates on the argument with respect to the remedial nature of the Board's discretion in these cases. In these circumstances, it claims, a restructuring of bargaining units and a representation vote will resolve the issues of undue fragmentation and will promote industrial peace. CUPE also points out that in this case, unlike most of the others the Board has dealt with, there has been full integration of two businesses and extensive intermingling has occurred as a result.

79. CUPE outlines the evidence of intermingling that had been presented that did not include the contested e-mails.

80. CUPE also argues that the *Silverwood Dairies*, (*supra*) decision is distinguishable from the facts before the Board and notes that it was in an industrial context at a very different point in time. The facts before this Board should be understood in the context of the ongoing massive restructuring of hospitals.

81. CUPE also argues that the members of its bargaining unit have the right to perform work at Perth that was formerly performed at Smiths Falls because its collective agreement contains a "no contracting out" clause as well as a "work of the bargaining unit clause". It notes as well that the hospital's corporate address is actually at Smiths Falls so it arguably has representation rights for the

entire hospital. It also claims that, in any case, the Board has the discretion under section 69(4) and (6) to amend the recognition clause in the collective agreement including the geographic scope.

82. CUPE then highlighted the labour relations difficulties caused by the current situation as experienced by its members. It advocates that the bargaining units be restructured into an “all employee” service/office/clerical unit which includes the non-union employees.

83. CUPE referred the Board to the following decisions:

Association of Allied Health Professionals v. Stratford General Hospital [1976] OLRB Rep. September 459

The Canadian Textile and Chemical Union v. Union Felt Products [1992] OLRB Rep. July 871

The Municipality of Metropolitan Toronto v. Ontario Nurses' Association [1992] OLRB Rep. March 315

The Toronto Hospital v. The Ontario Nurses' Association [1991] OLRB Rep. September 1098

Ontario Public Service Employees Union v. The Brantford General Hospital [1994] OLRB Rep. August 1103

Ontario Nurses' Association v. Kitchener-Waterloo Hospital [1991] OLRB Rep. October 1130

Ensign Security Services Inc. v. United Steelworkers of America [1994] OLRB Rep. October 1310

Teamsters, Local Union No. 647 v. Silverwood Dairies [1980] OLRB Rep. October 1526

Ontario Public Service Employees v. St. Mary's of the Lake Hospital [1995] OLRB Rep. October 1303

Canadian Union of Public Employees (Local 139) v. North Bay General Hospital [1995] OLRB Rep. November [1401]

84. ICTU directs its submissions primarily to the issue of the admissibility and weight to be given to the evidence of intermingling which was submitted. It argues that the documentary evidence relied upon by the hospital, particularly the e-mails, was hearsay and often “double hearsay” and should therefore be given no weight. It denies that the e-mails fall into the category of “business records” which would be an exception to the rule against the admission of hearsay. It also argues that the documents are not being used to prove specific facts of intermingling but to show the reason or the “rationale” for the various transfers of staff. Those explanations are the very issues upon which the parties opposing the application should be entitled to cross-examine. ICTU offers examples of the kinds of questions it would like to put in cross-examination with respect to one of the e-mails referring to Fred Kelly the electrician. It would like to ask the following questions about a day upon which he fixed a generator: Who sent him to fix it? Why was that day chosen? Was it that pressing? Did Kelly do the work? Did whoever sent Kelly have some alternative motive to “stack the deck”? Were there legitimate business reasons (for sending him the fix the generator)? ICTU argues that the evidence in this area has to be cogent as it is the central issue the Board has to decide. As the evidence is hearsay it is not cogent. It submits that faced with evidence that was merely hearsay it had no obligation to lead any contradictory evidence.

85. ICTU also objects that the e-mails were solicited by the hospital's only witness, Shirley Rogers, for the purposes of this litigation and that the documents themselves betray signs that the authors were conscious of trying to bolster the hospital's case. ICTU refers the Board to section 35 of the *Evidence Act, 1993* as amended. It argues that the documents would not fall within that section.

ICTU urges the Board to adopt the “best evidence rule” and that in this case the “best evidence” would be that of the managers who wrote the e-mails. It refers the Board to *The Law of Evidence in Canada* (Sopinka, J., Lederman, S., Bryant A., Butterworths) and *Adderly v. Bremner* [1968] 10. R. 621.

86. ICTU also argues that the application is premature in that there is no evidence that the hospital tried to negotiate with it with respect to its labour relations problems. It submits that intermingling has not, in any case, been demonstrated.

87. ICTU declined to take any position on what the bargaining unit structure should be if the Board does find the conditions of section 69 had been met. ICTU also declined to take any position as to whether it should be included on the ballot in the event that a vote was held.

88. OPSEU submits that the issue for the Board to decide is whether there has been intermingling under the Act as a result of the merger. If the Board finds that intermingling has occurred, does the situation warrant the Board’s interference? OPSEU argues that section 69(8) and (9) are to be used when the existing bargaining units cannot be preserved because the sale has created operational problems for the employer. In this case there was no intermingling within the meaning of the Act. Although there has been an amalgamation it is still possible to identify two operations in Smiths Falls and Perth. OPSEU challenges both the evidence of intermingling submitted by the hospital as well as its claims to be experiencing operational problems. A vote would not be appropriate in these circumstances because the employees have already chosen the bargaining agents that they want to represent them. Even if the Board finds that intermingling has occurred it was nominal and does not warrant intervention. In any case, there is no conflict in bargaining rights.

89. OPSEU adopts ICTU’s submissions with respect to the hearsay nature of the intermingling evidence. OPSEU focuses on the fact that Ms. Rogers had no personal knowledge as to whether bargaining unit members had been contacted before employees from outside the bargaining unit were assigned to do the work. She also had no personal knowledge of the “legitimate business reasons” used to justify the intermingling. OPSEU denies that this evidence falls within any exception to the hearsay rule. It notes that the e-mails clearly came from interested parties and that the hospital should have called the managers as witnesses so that they could be subject to cross-examination. It argues that the employer’s rationale for the various transfers of staff is not within OPSEU’s knowledge so it cannot be expected to lead contradictory evidence. It wants to be able to cross-examine the managers on what work the employees were doing; whether anyone in the bargaining unit was available to do it and whether it really had to be performed on a particular day.

90. OPSEU also argues that the intermingling that has been demonstrated is not sufficient to warrant the Board’s intervention in the form of a representation vote. Furthermore, most of the significant organizational changes had occurred prior to the Board’s October 1995 decision and the Board had not found at that time that intervention was warranted. OPSEU asserts further that the hospital did not have firm dates for future re-engineering changes and that any decision based on such proposed changes would be premature. OPSEU submits that the hospital is committed to retaining two active treatment sites so, presumably, labour relations difficulties between unions are not necessary. However, OPSEU accuses the hospital of actively attempting to create the appearance of labour relations problems since 1995. It alleges that the hospital’s decision to move the CUPE staff with the chronic care beds was in flagrant disregard of OPSEU’s collective agreement and was a deliberate attempt to create intermingling. According to OPSEU, if the hospital had accepted its proposal to post the jobs in the OPSEU bargaining unit it could have avoided operational difficulties. It also refers to other examples of what it considers to be the hospital’s attempt to create intermingling, such as the transfer of OPSEU bargaining unit employees to do work normally done by non-union employees at Smiths Falls since no one could grieve such a transfer, and the decision to transfer a trained dictatypist

to do work at Smiths Falls and replace her at Perth rather than to train a casual employee as a dictatypist at Smiths Falls.

91. OPSEU also reviews the history of its attempt to negotiate a transfer agreement. It submits that it is not appropriate for the Board to intervene as the hospital refused to negotiate a transfer agreement because it was determined to have the Board order a representation vote. OPSEU defends its proposals with respect to lay-offs and seniority on the basis that its members had less seniority than CUPE members. It argues as well that the July 8, 1996 agreement proves that it is possible to reach agreements that deal with the hospital's operational needs without combining the bargaining units and ordering a vote. Any disagreement with respect to the interpretation of that agreement can be submitted to an arbitrator.

92. OPSEU also argues that the transfer of staff that occurred was not intermingling within the meaning of the *Labour Relations Act* because the geographic scope of the bargaining units does not overlap. OPSEU relies upon a number of decisions of the Board which it claims support that principle, specifically *Silverwood Dairies*, (*supra*); *Chateau Gardens (Queens) Inc.*, [1979] OLRB Rep. Apr. 289; *Sunnylea Foods Limited*, [1981] OLRB Rep. Nov. 1640 and *New Dominion Stores Inc.*, [1986] OLRB Rep. Apr. 519. Since there is no overlap in the geographic scope, any employees who are transferred to the other site accrue to the bargaining unit represented by the union at that site. This, according to OPSEU is not intermingling for the purposes of the Act. OPSEU denies that the amendment contained in the July 8, 1996 agreement gave either paramedical union any representation rights at the other location.

93. Finally, OPSEU denies that there are ongoing operational difficulties or "cultural barriers" as a result of intermingling as alleged by the hospital. It notes that the one CUPE RPN who testified did not find any difference when working at either site and had no concerns about working at Perth. It points out that there was no evidence that the present structure was actually causing any difficulties with any committees. OPSEU also notes that it has not complained about any training that occurred across bargaining units with the exception of the Plotz grievance which is really a complaint that a position was not posted in the OPSEU bargaining unit. It denies that the problem with employees who have membership in both bargaining units arises from the merger. OPSEU challenges the hospital's assumption that optimal patient care is provided by the most senior staff. OPSEU also points out that a representation vote will not necessarily solve the problem of seniority and there may still be a requirement for negotiation and agreement on that issue. It argues that the employees' right to be represented by the bargaining agent they have freely chosen should be given precedent over the minimal operational difficulties alleged or proved by the hospital. It claimed that this approach is consistent with the most recent amendments to the *Labour Relations Act, 1995* which emphasize democracy. It reminds the Board that AAHP:O tried to displace OPSEU as the representative of employees in Perth in April, 1996 and was defeated. The employees have therefore recently expressed their views as to their preferred bargaining agent. Here, where the hospital is committed to retaining two active care facilities, there is no reason not to give effect to the employees' wishes. When a business remains functionally separate the Board must recognize the existing bargaining rights. The employees can easily identify which bargaining unit they belong to as the geographic scope does not overlap. Furthermore, the unions have allowed the employer to use employees from other bargaining units when necessary. OPSEU also asserts that the vote will not deal with any seniority issues and as the Board has no jurisdiction with respect to seniority that will still have to be resolved after the vote. OPSEU claims that it will be much more difficult to deal with that issue after the vote.

94. OPSEU refers to the following cases:

United Brotherhood of Carpenters and Joiners of America, Local Union 1669 v. Reimer Overhead Doors Ltd. [1984] OLRB Rep. Oct. 1493

Canadian Paperworkers' Union and its Local 36, 311 and 112 v. Somerville Belkin Industries Limited [1986] O.L.R.B. Rep. Sept. 1307

CAW-Canada v. Polytech Coatings Limited [1992] O.L.R.B. Rep. Mar. 362

Teamsters Local Union No. 647 v. Silverwood Dairies, [1980] O.L.R.B. Rep. Oct. 1526

Christian Labour Association of Canada v. Chateau Gardens (Queens) Inc., [1979] O.L.R.B. Rep. Apr. 289

United Food and Commercial Workers International Union v. Sunnylea Foods Limited, [1981] O.L.R.B. Rep. Nov. 1640

Loeb Inc. v. Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, [1985] O.L.R.B. Rep. May 697

United Food and Commercial Workers International Union, Locals 175 and 633 v. New Dominion Stores Inc., [1986] O.L.R.B. Rep. Apr. 519

The Canadian Textile and Chemical Union v. Union Felt Products (Ontario) Ltd., [1992] O.L.R.B. Rep. July 871

United Brotherhood of Carpenters and Joiners of America, Local Union No. 446 v. Pitts Engineering Construction, [1983] O.L.R.B. Rep. June 938

Division 1320, Amalgamated Transit Union v. City of Peterborough, [1979] O.L.R.B. Rep. Feb. 133

Teamsters Local Union No. 879 v. Hamilton Cargo Transit Limited, [1983] O.L.R.B. Rep. June 887

95. OPSEU adopts CUPE's submissions as to how the bargaining units should be comprised if the Board does order them to be amalgamated. It also agrees that the appropriate date for determining voter eligibility, in the event a vote is ordered, is the date of the application.

96. OPSEU submits that the "anomalous" positions found in both the OPSEU service and the AAHP:O paramedical unit, should remain in the service unit as they have been in the OPSEU bargaining unit for a number of years and therefore have a community of interest with that unit. It also notes that the paramedical units have no collective agreements.

97. The hospital replies to OPSEU's and ICTU's submissions with respect to the nature of the evidence of intermingling. It argues that it has demonstrated a *prima facie* case of intermingling and the issue with respect to whether or not it had legitimate business reasons for the transfer of employees only arises because OPSEU and ICTU have claimed that the hospital did not intermingle employees for *bona fide* reasons but for the sole purpose of proving intermingling to the Board. After a question from the Board, OPSEU agreed that its argument with respect to the documentary evidence applied to the "second part of the test", i.e. whether the hospital had *bona fide* reasons for intermingling. OPSEU agreed that it could not dispute that some intermingling had occurred. The hospital then pointed out that neither CUPE or ICTU have pleaded any particulars to support their claim that the transfer of employees was not *bona fide*. The hospital therefore responded to the allegation as best it could and provided the e-mails. However, the hospital argues the onus with respect to any challenge to the hospital's *bona fide* reasons for moving employees from site to site rests with the challengers, OPSEU and ICTU.

Decision

98. The relevant sections of the Act provide as follows:

69. (1) In this section,

“business” includes a part or parts thereof; (“entreprise”)

“sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings. (“vend”, “vendu”, “vente”)

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 16 or 59, sells his, her or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 16 or 59, as the case requires.

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
- (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

• • •

(6) Despite subsections (2) and (3), where a business was sold to person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and the person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) . declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);

- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in the unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

(7) Where a trade union or council of trade unions is declared to be the bargaining agent under subsection (6) and it is not already bound by a collective agreement with the successor employer with respect to the employees for whom it is declared to be the bargaining agent, it is entitled to give to the employer a written notice of its desire to bargain with a view to making a collective agreement, and the notice has the same effect as a notice under section 14.

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

(9) Where an application is made under this section, an employer is not required, despite the fact that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

(10) For the purposes of sections 7, 63, 65, 67 and 132, a notice given by a trade union or council of trade unions under subsection (3) or a declaration made by the Board under subsection (6) has the same effect as a certification under section 10.

99. The facts of this case fall within section 69(6) above. The Board found in its October 1995 decision that a sale of a business had occurred and in its decision dated March 20, 1997 that intermingling had occurred for the purposes of the Act. On the basis of those determinations, the Board directed that the ten bargaining units be combined into two bargaining units and that a representation vote be held.

The Evidentiary Challenge: Has the Hospital Demonstrated that “Intermingling” Has Taken Place?

100. OPSEU and ICTU deny that the Board can find intermingling for the purposes of the Act on the facts of this case. Most of their arguments stem from the claim that the hospital has failed to prove that it has transferred employees from one bargaining unit or site to the other for *bona fide* reasons. The applicant introduced numerous e-mails from hospital department managers to the Manager of Human Resources, Ms. Rogers, detailing the reasons that employees were moved from one site to another into evidence. The majority of these e-mails were forwarded after the application and responses were filed and were submitted to Ms. Rogers at her request to meet OPSEU's and ICTU's allegations that the “intermingling” which had taken place was undertaken in bad faith. The Board permitted these e-mails to be introduced in the hearing through Ms. Rogers subject to objections by OPSEU and ICTU that they were hearsay. The Board ruled that the documents could be introduced through the Manager of Human Resources as the source of her information. It was appropriate for her to testify to her complete understanding of the facts supporting the hospital's application. However, to the extent that the documents are intended to “prove” the reasons for the movement of staff the Board agrees that they are hearsay. The hospital claims that the e-mails are business documents and therefore an exception to the rule against hearsay, but the Board finds that they have no greater status than if Ms. Rogers' repeated a verbal conversation she had with a manager.

101. Nevertheless, the absence of direct evidence for the *reasons* for each instance of intermingling is not fatal to the applicant's case. OPSEU and ICTU allege that the hospital has acted in bad faith but it is not sufficient to merely make such an allegation in defence of an application of this nature. Although OPSEU claimed in its response that the hospital had committed an unfair labour practice it did not file an application under section 96 of the Act. It cannot make such an allegation in a defence to an application under section 69 of the Act and then claim that the applicant has the obligation to prove the contrary. The hospital provided extensive particulars as to the reasons for the movement of staff, sufficient for OPSEU and ICTU to do any investigation necessary to determine the validity of the reasons. They had the onus of showing a *prima facie* case of bad faith in the transfer of employees and if they had, it would have been incumbent on the hospital to adduce evidence to justify its actions.

102. The only evidence submitted by OPSEU with respect to its allegation was the conversation in which Ms. Rogers indicated that the hospital was not interested in OPSEU's transfer agreement proposal as it would prevent the hospital from ever returning to the Board for a vote. That evidence does not amount to a *prima facie* case of bad faith as the hospital had no ongoing obligation to bargain a transfer agreement with OPSEU if it was of the view that such an agreement would not resolve its concerns. OPSEU and ICTU therefore have not demonstrated a *prima facie* case. The Board accepts that the "intermingling" took place and will not go behind the fact of its occurrence to search out improper motives.

103. The e-mails indicate that the managers knew that they were being solicited to support the application. However, there is no indication that the actual intermingling occurred for that reason. There is nothing about the intermingling that suggests illegitimacy, there is no pattern or anything suspicious about the circumstances in which the occurrences took place. Mr. McNicol testified that his wife had agreed with a colleague to work the shift that Ms. LaRocque was called in for. However, management was not originally apprised of that agreement, and when Mr. McNicol's wife did call to advise she could work she was informed that someone had been found. OPSEU then filed a grievance. If anything, this is an example of the problems the hospital faces with the present situation. It must exhaust every possible bargaining unit source to perform the work or risk facing a grievance. This is an expenditure of time and effort it should not have to make in a merged facility.

104. OPSEU and ICTU also argue that the hospital's case should fail because it did not produce the managers who had direct knowledge of exactly what work employees were performing. They claim that without this evidence the hospital has not shown that the employees performed work normally within the scope of another union's bargaining unit. This objection must also fail. OPSEU's and ICTU's bargaining rights cover all hospital employees at Perth except the lab and anyone excluded as managerial or confidential. CUPE and AAHP:O represent all employees at Smiths Falls except the clerical employees. The Board can infer from the breadth of the bargaining units and from the positions held by those doing the work that in most cases the work being done could be claimed by another union or that intermingling between union and non-union employees was occurring.

105. OPSEU and ICTU did not directly challenge the fact of the movement of employees. In argument OPSEU acknowledged that it could not dispute that some intermingling had occurred. In its response to the application OPSEU also acknowledges some intermingling has occurred as follows:

8. With respect to nursing, the Respondent OPSEU does represent RPN's. Commencing on September 11, 1996, the Applicant has on limited occasions used part-time or casual RPN's employed as [sic] the Smiths Falls site to work at the Perth site instead of calling in part-time or casual RPN's employed at the Perth site or posting a vacancy for casual RPN's at Perth. OPSEU has filed a grievance regarding these transfers (which is attached to Schedule A of the Application as Exhibit 80).

It also states at paragraph 18 of its response:

18. On or about May 1, 1996, the Respondent began on occasion assigning members of the OPSEU bargaining units to the Smiths Falls site to work in non-union positions. When questioned by Mr. McNicol about this, Ms. Rogers stated that this was being done to try to show intermingling, that the people were being placed in non-union jobs so neither union could grieve and that this way the Respondent [sic] could “get one union and it wouldn’t be OPSEU.” Mr. McNicol again asked about the agreement and was told by the Respondent [sic] was not interested in an agreement, only a vote and was not interested in talking about a proposal Mr. McNicol had to avoid job loss at either site. At about the same time the Applicant began on a very occasional basis to assign OPSEU members to do temporary work of CUPE members in Smiths Falls and CUPE members to do temporary work of OPSEU members in Perth.

[Note: OPSEU did not pursue the claim that the hospital was attempting to insure that OPSEU would not represent the employees.]

106. Neither OPSEU nor ICTU called any evidence or made any argument to challenge the fact of the movement of employees and there is other evidence to support that it occurred. CUPE and AAHP:O agreed that the intermingling involving their members had occurred. Furthermore the grievances filed support that instances complained about in those documents took place. The Board therefore accepts that the transfer of staff outlined above occurred as alleged.

Is the Assignment of Employees That Has Taken Place Intermingling for the Purposes of the Act?

107. OPSEU and ICTU argued that the assignment of employees that has taken place is not intermingling for the purposes of the Act because the scope of the bargaining units do not overlap. In fact the scope of two of the OPSEU bargaining units could arguably extend to the Smiths Falls location but the Board accepts OPSEU’s apparent assertion that it does not interpret its agreement that way. Nevertheless, the Board does consider the intermingling which has taken place to be intermingling for the purposes of the Act. The intent of section 69 of the Act is twofold. It provides trade unions with the right to continue to represent employees after the sale of a business. However, it also permits parties to apply to have significant changes made to bargaining structures and bargaining agents in the event the unions’ rights to continue to represent employees conflict with the result that difficulties arise for the operation of the business. In other words, a business is not supposed to be significantly disadvantaged in its ability to function because two or more unions now represent its employees and a conflict arises.

108. The essence of OPSEU’s argument is that if the hospital were to comply with its collective agreement as OPSEU interprets it, there would be no operational or labour relations difficulties. If anyone is to be moved to Perth, there would be a new position in the OPSEU bargaining unit. Therefore, rather than moving someone from Smiths Falls along with a service or a bed, the position should just be posted as an OPSEU position as required by its collective agreement. The position is an “accretion” to the OPSEU bargaining unit and would presumably be filled first by qualified or laid off OPSEU bargaining unit members. The same argument would apply to jobs moving to Smiths Falls if that were ever to occur. If someone is moved temporarily, it appears that OPSEU may not complain providing that the hospital has made every effort to find an OPSEU member to do the work first. However, it also appears that OPSEU believes that it does have the right to grieve in such a situation but is showing its willingness to accommodate the hospital’s business requirements. On the other hand CUPE believes that its collective agreement protects its members if their positions are transferred to Perth. It claims that its agreement does not permit employees other than those in its bargaining unit from doing its work and that its work cannot be contracted out. Both unions have filed grievances with respect to the transfer of employees. The hospital is caught in the middle. Both unions could conceivably win their arbitrations and then it may be impossible to resolve the situation. At the moment, the hospital appears to recognize that both unions have legitimate claims and is therefore generally proceeding on the basis that employees should move with their work. This is not an unreasonable position from the hospital’s

point of view. In the meantime, the hospital is also burdened by the extra work involved in trying to exhaust bargaining unit lists before assigning available employees to do the work or face a grievance. The Board agrees with OPSEU that it is probably not a coincidence that the hospital has had OPSEU members doing non-union work at Smiths Falls on numerous occasions since it can exercise that flexibility without facing any grievances.

109. There are, as yet, no collective agreements applying to the paramedical units so there can be no grievances with respect to that work except where OPSEU has alleged that an AAHP:O employee is doing the work of someone in its service unit. The parties have, however, reached an agreement which specifically contemplates the intermingling of employees. Under the July 8, 1996 agreement, employees doing the same work under different terms and conditions of employment will be working side by side. It appears that the purpose of the agreement was to permit precisely that kind of intermingling without OPSEU and AAHP:O disputing it. Unfortunately, the parties do not appear to have had the same understanding of the agreement at the time they signed it and OPSEU read it much more narrowly than AAHP:O and the hospital. Even now, after OPSEU has attempted to clarify its position, there is still significant room for dispute as to how the settlement would be interpreted. It is unclear what OPSEU means by the stipulation "properly move persons in other occupations" in the letter drafted by its counsel and it appears there is still room for further grievances and labour relations difficulties. For example, the parties may have very different views on whether the July 8, 1996 agreement applies to permanent transfers (see, for example, Madeline Forrest and Vicki Craig in paragraph 27 above). It is also not clear whether the agreement applies to someone from the AAHP:O unit being transferred to the OPSEU service unit. What is clear is that the hospital needs flexibility in moving its paramedical professionals from site to site, and the terms and conditions of employment of those employees ought not to change each time they are providing therapy to a patient at a different site.

110. The Board therefore finds that intermingling for the purposes of section 69(6) of the Act has occurred. Employees who are in one bargaining unit have been moved both temporarily and permanently to a location where another bargaining agent claims rights. Two or more different bargaining agents are claiming that certain work is the work of their bargaining units and numerous grievances have been filed as a result.

111. This area of the Board's jurisprudence is evolving to meet the current labour relations realities. Hospitals have recently been frequently transferring services or merging parts or all of their operations. This activity is only going to increase in the near future. A few years ago, no one would have predicted the extent that hospitals would be facing the labour relations fall-out which is the natural result of such restructuring. Nevertheless, section 69 provides the Board with some tools (although far from a complete kit) to assist the parties with these difficulties. Section 69 must be interpreted with that in mind. The Board is aware that the kinds of problems caused by restructuring in hospitals are compounded by the bargaining unit fragmentation which is traditional in that sector. It is not uncommon for a hospital's employees to be represented by four or even five unions. If it is merged with another hospital or service with a like number of bargaining agents, the operational problems may be staggering. In this case there are four unions and seven to ten bargaining units involved. That is a distinguishing feature of this case from the decisions relied upon by OPSEU and ICTU in which typically only two unions are involved.

112. This case is also distinguishable from the decisions relied upon by OPSEU and ICTU because the hospital is a merged entity which now straddles both geographic scopes with the result that employees regularly move back and forth. In *Silverwood Dairies*; *Chateau Gardens (Queens) Inc.* and *Sunnylea Foods*, the employers had all closed part of the business and moved operations to another location outside the geographic scope. In such circumstances, the Board has said that the union should

not be better off as a result of a sale than if the company had just moved to a new location outside of the geographic scope. That is not the case here. In *Union Felt*, the one decision in which both plants remained operational and intermingling occurred, the Board did order a vote. The other cases relied upon by OPSEU and ICTU are those in which the Board found that insufficient intermingling occurred to warrant interference. The intermingling demonstrated in this case far exceeds the examples given in any of the other decisions.

113. OPSEU and ICTU claim that staff moved to Perth should be treated as an accretion to their bargaining units. This concept of “accretion” is not found in section 69(6) of the Act and the Board noted in *Metropolitan Parking (supra)* that it is not particularly helpful. (See *Metropolitan Parking (supra)*, at paragraph 58.) In this case, employees are being moved back and forth between sites with regularity. They cannot be an “accretion” to the other bargaining unit for part of the time, i.e. the maintenance staff cannot be an accretion to one or the other bargaining unit depending on what floors they are stripping. If such were the case, the terms and conditions of employment of the employees would be constantly changing and they would all essentially be covered by two collective agreements. It appears that OPSEU and ICTU may be willing to forbear complaining about such temporary transfers, providing the hospital has a *bona fide* reason acceptable to the union and has exhausted the list of employees in the bargaining unit. However, the unions reserve their right to grieve these situations, and have done so. The effort the hospital must make to avoid such grievances is significant and inevitably occasions will arise when the unions are not satisfied with the hospital’s efforts and will grieve. In any case, the employees are still left performing the same work beside someone with different terms and conditions of employment.

114. Furthermore, the hospital is of the view that both unions have the right to claim certain work and that, for example, CUPE is entitled to claim work transferred from Smiths Falls to Perth. OPSEU’s position means that the hospital would be precluded from this interpretation of the collective agreement it entered with CUPE. If OPSEU is ultimately wrong that CUPE has no right to this work, the hospital is in an untenable position.

115. For all of the above reasons, the Board finds the *Silverwood Dairies* line of cases distinguishable from the facts of this case. These facts are much closer to those cases relied upon by CUPE and AAHP:O in which the Board has found intermingling and has ordered a vote. The problems posed by the intermingling is the same in those cases as in this and the same remedy is available here.

Does the Intermingling Which Has Taken Place Warrant Intervention From the Board?

116. Ms. Rogers testified that the present situation causes operational difficulties for the hospital. It cannot retain or recruit the most senior employees. If OPSEU’s claim to all work performed at Perth prevails, the hospital cannot transfer employees along with the services they work in. This is particularly significant with the chronic care beds in which the patients have a long-term relationship with the staff. The hospital needs to be able to move staff around to fill vacancies and it needs to be able to assign employees, particularly its maintenance, physical plant and paramedical people to either location. If it does transfer employees, it may face grievances and future jurisdictional dispute applications. In any case, it has employees working side by side with different terms and conditions of employment. On the other hand, the Board is not convinced, given the lack of any evidence, that the present situation presents “cultural” barriers or impediments to employees understanding themselves to be working for an integrated enterprise. Furthermore, while the existence of two unions representing the same types of employees on the same committees could conceivably cause problems there is no evidence that it has done so.

117. OPSEU also argues that the Board should not intervene because the other parties, except ICTU, have been unwilling to negotiate a transfer agreement which would vitiate the necessity of any

Board interference. However, the Board does not consider this a persuasive argument not to intervene in these circumstances.

118. The unattractiveness of OPSEU's proposals to the other parties (except ICTU) reflects the conflicting interests that underlie this application. OPSEU cannot agree to a merger of bargaining units and a representation vote even if it is prepared to risk its representation rights because its members have less seniority than CUPE's members and may therefore be more adversely affected by pending lay-offs. CUPE cannot agree to maintain the *status quo* even if its members' seniority would be recognized once they were appointed to positions at Perth (which is no longer the case) because they will not get many of the positions at Perth. As it has been apparent for some time that the South Unit will be downsizing and that any job growth will be at Perth, CUPE's members are adversely affected by a *quid pro quo* agreement. That is generally true for AAHP:O as well.

119. The hospital could take the position that any jobs at Perth are OPSEU's as OPSEU proposes and face the many grievances likely to follow. However, the hospital claims to be of the view that CUPE does have a legal right to the jobs that accompany work formerly performed at Smiths Falls. It also objects to OPSEU's proposals on the grounds that it is both unfair and bad for patient care to lay off its most senior employees because the jobs, particularly jobs that have been the jobs of CUPE members, have to go to less senior OPSEU members first. The hospital was opposed to OPSEU's written proposals as it believed it would prevent it from making further re-engineering changes because it prohibited lay-offs and reclassifications and it objected to the provision which provided for no seniority for non-unionized employees. Ms. Rogers also did agree that she did not want to sign the agreement proposed by OPSEU because it would prevent the hospital from filing an application such as this with the Board no matter what changes transpired in the future.

120. The hospital and the other unions have no statutory obligation to negotiate a transfer agreement, unlike their obligation to bargain in good faith for a collective agreement. Nevertheless, the Board generally encourages parties to try to resolve their differences through negotiation. In these circumstances, for the reasons outlined above, it is unlikely that there would be common ground between the parties. OPSEU could not agree to full seniority for CUPE members and CUPE could not agree to anything else. OPSEU complained that no one would really enter a give and take exchange with respect to its proposals. It claimed that even if the proposals on their face were unacceptable to the other parties they should have known that they could be subject to negotiation. However, when the central issue in the agreement is fundamentally unacceptable to other parties, it may well be that they will not embark on the process if they are not legally required to do so. This is particularly true if they see other options as being more to their advantage. While the parties should have been more forthcoming in their responses to OPSEU's proposals, the Board does not see their refusal to seriously enter negotiations for a transfer agreement in these circumstances as a good reason not to intervene in the face of the intermingling and resulting operational difficulties demonstrated by the applicant.

What kind of Intervention is Appropriate in the Circumstances?

121. The problems outlined above are principally caused by two factors. The first is that there is more than one bargaining unit with employees performing the same work and the second is that more than one trade union represents the different bargaining units. It was therefore appropriate for the Board to exercise its discretion under section 69(6)(d) to amend the bargaining units defined in the certificates and collective agreements and then to exercise its discretion under section 69(8) to order a representation vote to determine which trade unions will represent the employees.

122. Section 69(6)(b) of the Act permits the Board to determine whether the employees constitute one or more "appropriate" bargaining units. Section 69(6)(d) permits the Board to amend bargaining unit definitions as necessary. The determination as to how the new bargaining units should be described

in this case was made on the basis that the bargaining units likely to be in conflict, that is, the units whose work overlapped, should be combined. The Board also took into account that it was OPSEU's position that its service and clerical units were already one bargaining unit and that all of the parties agreed that the full-time and part-time units should be combined. The Board therefore made the directions outlined in paragraphs 12 and 13 above.

123. The Board also had to determine whether the physiotherapy assistant and activity coordinator positions should be included in the clerical/service or the paramedical bargaining unit. For the reasons outlined in paragraph 6 of its March 20, 1997 decision the Board directed that the positions be included in the paramedical bargaining unit. OPSEU has requested that the Board reconsider that decision. It submits essentially that the fact that these two positions have been included in the OPSEU service unit for some time indicates that they have a community of interest with that bargaining unit. Furthermore, the president of the OPSEU local holds the position of Activity Coordinator. The Board has some sympathy with the problems caused by the fact that OPSEU's president holds one of the positions found to be in the other bargaining unit and the Board had some hopes that the other unions would find a way to accommodate that problem. However, the Board must determine the appropriate bargaining units for this restructured environment. On the limited evidence submitted by the parties, the positions appear to be paramedical rather than clerical or service. In any case OPSEU has not provided any argument as to why this decision should be reconsidered which was not included in its original submissions on this issue. The Board therefore declines to reconsider its decision.

124. The Board decided that all of the unions which represented the combined bargaining units should participate in the vote. ICTU had originally declined to take a position on whether it should be included on the ballot but has since requested that it not be. The Board had to decide whether the non-unionized employees would be included in the combined bargaining unit. The non-unionized employees had to be included in the combined service/clerical bargaining unit in order for the problems caused by intermingling the unionized and non-unionized employees to be resolved. The Board did not consider it appropriate to provide an option on the ballot for employees to choose not to be represented by any trade union because the vast majority of employees in the combined bargaining unit are unionized and in the circumstances it is not appropriate for this representation vote to be a decertification vote.

125. For all of the above reasons, the Board made the declarations and directions contained in paragraph 15 of its March 20, 1997 decision. For ease of reference the Board repeats those declarations and directions here:

- 1) A sale of a business within the meaning of the Act has occurred.
- 2) There has been an intermingling of employees within the meaning of section 69(6) of the Act.
- 3) Two representation votes will be conducted to determine which union shall represent the employees of the employer in the bargaining units set out in paragraphs 7 and 13 [of the March 20, 1997 decision] above.
- 4) All employees of the applicant on September 19, 1996, are eligible to vote. (The parties agreed that eligibility should be determined by the application date.)
- 5) Employees in the paramedical unit will be asked whether they wish to be represented by OPSEU or AAHP:O. Employees in the other unit will be asked whether they wish to be represented by OPSEU, ICTU or CUPE. [ICTU subsequently withdrew from the ballot.]

126. Prior to and subsequent to the representation votes, the Board received correspondence from the parties with respect to issues related to those votes. Those issues will be outlined and dealt with in a subsequent decision of the Board relating to the conduct and outcome of the votes.

0009-97-R The Canadian Union of Operating Engineers and General Workers, Applicant v. 95467 Ontario Ltd. c.o.b. as **Pet-Pak Containers**, Responding Party

Build-Up - Certification - 52 of 86 ballots counted in representation vote cast in favour of union representation - Employer asking Board to apply build-up principle and to hold new vote 8 weeks later when number of actual employment positions will have increased by 53% - Board accepting union's calculation of potential build-up as no more than 41% - Board seeing no reason to order second vote - Certificate issuing

BEFORE: *Christopher Albertyn*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

APPEARANCES: *Craig Morrison* and *Terry Fitzpatrick* for the applicant; *Stewart Saxe*, *Stephen Dulong* and *Jo-Ann Codlin* for the responding party.

DECISION OF CHRISTOPHER ALBERTYN, VICE-CHAIR, AND BOARD MEMBER H. PEACOCK; June 17, 1997

1. This is an application for certification.

2. The parties have agreed upon the description of the bargaining unit:

all employees of Pet-Pak Containers in the Regional Municipality of Peel, save and except supervisors and technicians, persons above the rank of supervisors and technicians, office and clerical staff.

The Board finds that unit to be a unit appropriate for collective bargaining.

3. A representation vote was ordered by the Board on April 4, 1997 and held on April 8, 1997. The outcome of the vote was as follows:

DATE OF VOTE: April 8, 1997

1.	Number of persons on voters' list at start of vote	99
2.	Number of persons who voted	93
3.	Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	90
4.	Number of segregated ballots cast by persons whose names appear on voters' list	3
5.	Number of segregated ballots cast by persons whose names do not appear on voters' list	-
6.	BALLOT BOX SEALED YES NO	
7.	Number of spoiled ballots	4
8.	Number of ballots marked in <i>favour</i> of applicant	52

9.	Number of ballots marked <i>against</i> applicant	34
10.	Number of ballots marked in favour of intervenor	—
11.	Ballots segregated and not counted	3

DATED at Mississauga, Ontario on April 8, 1997.

4. In the employer's response to the application it alleged a build-up of employees and, as a result, applying the 'build-up' principle, it contended that the vote should be held on or after May 29, 1997, when a work force more representative of the employer's eventual staff complement will have been employed. The Board considered that contention in its decision of April 4, 1997 and stated the following:

The Board considers it appropriate to hold a vote and to determine the "build-up" issue raised by the employer at the hearing after the vote. In the event that the responding party's "build-up" argument is successful, it may be necessary to hold a second vote.

The Issue

5. The hearing occurred on May 5, 1997. The issue was whether a new representation vote should be ordered on account of the 'build-up'. The employer's counsel argued that 'build-up' had occurred, thus rendering the representation vote of April 8, 1997 an inexact and misleading indication of the true wishes of the employees who will soon constitute the bargaining unit. To remedy the situation, a new representation vote should be ordered towards the end of May 1997, or thereafter, when the 'build-up' process will have reached a relatively stable plateau. The union's counsel argued that Bill 7 has so altered the process of determining a union's entitlement to collectively represent a bargaining unit, that the 'build-up' argument no longer has currency; alternatively, that 'build-up', as understood in the Board's jurisprudence, has not occurred in this case.

The Factual Background

6. The employer manufactures plastic bottles, mainly for the liquor and soft drinks industry. Until about March 1997 the employer had relatively few full-time employees, but several part-time or 'on-call' employees. They were available to the employer to be summoned on an 'as needed' basis. At about that time, as a consequence of growing demand for its product, the employer decided that it needed to operate from a second plant and with a larger proportion of full-time employees. It decided also to develop a more structured approach to employment and it engaged the services of a Human Resources Director to provide the organizational foundation for its personnel arrangements.

7. On March 12, 1997 the employer issued a notice to all of its production staff announcing the opening of a second production plant during April 1997. The notice informed staff that some employees would be moved to the new plant; some would have new job responsibilities; some would work on different shifts. The titles of some positions would change. The notice advised employees of the pay scales for each job and it informed employees how they could switch their shift, plant or job assignments with any other employee, by mutual agreement. The notice contained organizational charts of the existing staff structure and of the anticipated future structure and schedules of the positions that would exist in the new structure. What the schedules reveal is that, on March 12, 1997, there were 54 full-time bargaining unit positions and, with the opening of the new plant, management anticipated that there would be 130 full-time bargaining unit positions.

8. On April 1, 1997 the parties agreed upon the voters list for the forthcoming representation vote. There were 64 full-time employees and 35 part-timers, making a total of 99 employees in the bargaining unit. On the date of the vote, April 8, 1997, 6 additional part-timers arrived and voted.

Their participation was initially challenged, although both parties subsequently agreed that they were employees and that their votes should be counted and included in the totals. The effect of their inclusion is that, on April 8, 1997, when the vote occurred there were 64 full-time and 41 part-time employees, making a total of 105, who made up the employees in the bargaining unit.

9. On April 29, 1997 the employer produced a second, updating memorandum concerning the opening of its second production plant, which was sent to all employees. The memorandum deals with several matters regarding the expansion of the employer's business and it identifies numerous positions which are available to be filled. It contemplates a staff complement within the bargaining unit of 137 full-time employees at the two production sites. The memorandum advises part-time employees what they should do if they wish to apply for full-time positions.

10. The intention of the employer is to have a more stable work force, with a greater proportion of full-time to part-time employees than existed prior to April 1997. The employer wishes to have less reliance on part-time employees than it did previously. Hence, as of April 29, 1997, the contemplation of the employer was that the number of full-time employees would increase from 64 full-time positions - the number determined at the representation vote on April 8, 1997 - to 137 full-time positions by the end of May 1997. The employer's expectation was that the number of part-timers would remain constant. There would be no appreciable difference in the number of part-timers from the number employed on April 8, 1997. Given the employer's intention to rely less upon part-timers and to reduce the 'on-call' method of employment in preference for a more stable, full-time complement of employees, and the replacement of part-timers by full-timers, the absolute number of part-time employees is probably likely to decline. Nevertheless, for the purposes of this decision and subject to a comment below, we accept that the number of part-timers in the bargaining unit will remain constant at 41.

The parties' contentions regarding the numbers for 'build-up'

11. The employer's counsel urged upon us that, for the purpose of calculating the number of employees to determine if there has been a 'build-up', we should have regard only to the actual employment positions in the company. The number increased from 64 on the date of the representation vote to 137 by the end of May 1997, an increase of 114%, or 53% of the eventual total. The employer's counsel argued that the calculation for the purposes of the 'build-up' argument must include only positions within the company. The part-timers - the 'on-call' employees - do not occupy positions of employment. They merely replace employees who do occupy positions of employment when they are on vacation or sick leave. At any one time there will not be more than a handful (7 or 8 employees) actually at work from the pool of the 'on-call' or part-time employees. The number of part-time employees at any one time is unpredictable and depends upon the particular production demands of the company and the number of full-time, regular employees who are at work then. The 'on-call' employees merely fill in for regular employees and, given the uncertain and inherently contingent nature of their employment, their numbers should not be taken into account in assessing whether or not there has been a 'build-up'. The true basis for the determination of a 'build-up' is the number of employment positions within the company and that number is an increase from 64 to 137. On that basis, an increase of 53%, the Board's standard for 'build-up' has been realized.

12. The union takes a different approach. Its counsel argues that the bargaining unit is not divided between full-time and part-time employees: it is an all-employee bargaining unit. Hence, as the parties themselves did when they determined employee voter eligibility on April 8, 1997, all employees of the company should be taken into account for the purposes of assessing whether there has been a 'build-up'. The fact that the part-timers do not work every day, but work to replace full-timers who are away from work or when there are special production demands, does not detract from their status as employees who are part of the bargaining unit and whom the employer was willing to accept as part of

the voting constituency in the representation ballot. Doing that would result in the following transition: on April 8, 1997 there were 105 employees (64 full-time and 41 part-time); at the end of May 1997 there will be 178 employees (137 full-time and 41 part-time). On the basis of those figures there has been an increase of only 41% and hence no 'build-up'.

What is 'build-up'?

13. In *Emil Frant and Peter Waselovich*, 57 CLLC ¶18,057 the Board described the circumstances in which it will order a deferred vote on the basis of a 'build-up': 1. the (current) employees do not constitute a substantial and representative segment of the eventual work force, i.e. they are less than 50% of the eventual total; 2. there is a real likelihood of a build-up of employees to the anticipated eventual number within a reasonable period of time; and 3. the build-up does not depend upon factors beyond the control of the employer, but must be a firm plan of the employer. An additional consideration is that the build-up should not be a response to the union's certification application, but should genuinely have been contemplated by the employer prior to it having knowledge of the union's recruitment endeavours.

14. *F. Lepper & Son Ltd.*, [1977] OLRB Rep. December 846, at ¶10 describes a fourth requirement for a 'build-up' argument to succeed, as follows: 'as another yardstick in determining the representative character of the existing work force, the Board looks to the proportion of projected classifications that are filled at the date of the application.' This, like the requirement that the Board determine whether 'the employees employed at the time of the application constitute more than 50% of the anticipated number of employees' (¶10), is really a variant of the central test for a delayed vote. The Board must be satisfied that the employees who initially established the union's representativeness do not constitute a sufficiently representative proportion of the eventual staff complement in the bargaining unit. Therefore the core requirement is to determine what constitutes a sufficiently representative proportion of the eventual staff complement in the bargaining unit. Having made that determination, the resulting figure is compared to the actual number who participated in the first count - in this case, the representation vote on April 8, 1997.

15. In deciding matters of this sort the Board has sought to balance the interest of the existing employees (to have their collective bargaining agent certified and to have it commence the process of collective bargaining on their behalf without undue delay) against the interests of employees who are soon to be hired (to be able to influence whether or not they will be represented by a union and, if so, what mandate the union should have in collective bargaining). The method by which the Board has effected that balance has been to determine firstly the likelihood of the hire of the new group of employees, then the proximity of their hire. If their employment is virtually certain and it will occur soon, then the Board moves to the next inquiry: is the anticipated group of new employees of sufficient size relative to the existing group of employees (who have expressed their preference for the union) such that their views ought properly to be taken into account? Leaving aside consideration of significant changes in job classifications, which do not arise in this case, the Board has usually conducted this inquiry on the basis of a majoritarian test: if the existing group of employees, who have made their choice, outnumber the incoming group then the former's views prevail and no second vote is usually ordered. If the incoming group outnumbers the existing group, then a vote is usually ordered. The Board has treated the 50% threshold (i.e. 50% of the eventual total) as a guide to determine the representativity of the existing group of employees as compared to the eventual group of employees (*Brick Brewing Co. Limited*, [1985] OLRB Rep. November 1557, 1560; *Samuel Manu-Tech Inc.*, Quicklaw [1994] OLRD No. 4342 File No. 2562-94-R December 1, 1994 ¶¶18-19, 25; *Northland Power Partnership*, [1991] OLRB Rep. June 768, at 769 ¶18; *Hawk Security Systems Ltd.* [1993] OLRB Rep. August 751, ¶22). There are cases in which the absolute application of the 50% guide may produce an unreasonable result, but in general, if the incoming group will outnumber the existing group of

employees, and the primary considerations are satisfied, then there should be a second vote, otherwise not.

16. The employer's counsel suggested that the 50% rule should not be applied rigidly, but should depend upon the circumstances of each case. The 50% rule, on this argument, is merely a guideline to assist the Board in its primary inquiry, which is to determine if the group who participated in the initial vote were sufficiently representative of the eventual work force that one may comfortably assert that no second vote is necessary. The absence of a second vote should not offend one's sense of democratic fairness. Accordingly, the proximity of the proposed second vote to the first - in this case merely a matter of 7 or 8 weeks - should have a bearing upon whether the second vote should be held. The absence of any significant delay should militate towards the holding of the second vote if it will be more representative than the first.

17. We accept that the 50% test is a guide and it should not be rigidly applied. We accept also that the proposed proximity of a second vote and the certainty of the increase in numbers should have a bearing upon the exercise of the Board's discretion to order a second vote. The existing approach is first to determine whether the 'build-up' will occur within a reasonable time. If it will not, then that is the end of the matter. If it will, and if the anticipated increase is relatively certain (as in this case), then the second inquiry occurs: will the existing work force be significantly outnumbered by the anticipated workers? If not, then there is no second vote; if so, then there is.

18. Accordingly, while we do not apply the 50% rule in a rigid manner, it is a useful guide to determine whether the existing composition of the bargaining unit is sufficiently representative of the eventual composition so as to obviate the need for a second representation vote.

The Impact of Bill 7

19. What is the impact of Bill 7 upon the 'build-up' doctrine? The employer's counsel argues that there has been a fundamental philosophical change in the legislature's approach to labour relations from what existed before. Prior to Bill 7, every change to the *Labour Relations Act* was an amendment of the existing statute. Bill 7 ushered in a wholly new Act with fresh philosophical underpinnings. The new Act is founded upon the principle that there must be a vote in every case and that a representation vote is the preferred method of determining the views of employees. The employer's counsel therefore urges us to accept that its impact is to affirm the importance of determining the true wishes of all interested employees and accordingly all employees who are likely to be affected by the vote (and that would include those who will be in employment by the end of May 1997) should be entitled to vote upon the future of their employment relations with their employer. As a consequence the build-up principle has even greater efficacy under Bill 7 and should be flexibly and readily applied in this instance.

20. The union's counsel suggests that Bill 7 has the opposite effect of doing away with the 'build-up' principle. No more should we have regard to what is to happen in the future. The *Labour Relations Act* now requires that a snapshot view be taken of union support on the date of the representation vote, and that is the true test of employee support. *The Act* contemplates a quick, certain result which is not subsequently set aside, except in circumstances described in section 11, which do not apply to this case. The 'build up' doctrine is antithetical to the requirement of a quick vote.

21. The Union's counsel suggested that the new requirement under section 44 of *the Act* for a ratification vote by a union supports the notion that no second representation vote is required. If, in fact, there has been 'build-up', then the new majority of employees, who were not involved in the representation vote for the union's certification, will have their say in the ratification vote. They can

reject the union's recommendations in that context if they do not wish to be represented by it any longer. They can thereby create the preconditions for a termination application, if they so choose.

22. There are some indications in the scheme of *Bill 7* which suggest that *Bill 7* does not perpetuate the 'build-up' doctrine. The representation vote occurs quickly after the Board receives a certification application. Not all eligible voters are likely to participate in the ballot, despite their entitlement to vote. Some will be on vacation, or sick leave or sabbatical. Their absences do not vitiate the force and effectiveness of the ballot. The quick certainty of the result, with a minimum period of campaigning, is treated as a more valuable labour relations interest than the inclusion of everyone who might be affected by the result of the vote. By extrapolation, the same interest may prevail in respect of employees whose interests are protected by the 'build-up' doctrine. Like those absent from work on the date of the representation ballot, future employees may reasonably be excluded from the ballot.

23. A further indication that *Bill 7* may not preserve the 'build-up' doctrine is, as the union's counsel suggested, the mandatory requirement of a ratification ballot for every collective agreement. The 'future' employees get their chance to decide whether they like what the union has done for them.

24. These indications contrast with others in *the Act* which suggest that 'build-up' has not been eliminated. There was no amendment to section 128(2) of *the Act* when *Bill 7* was passed. That subsection reads as follows:

128. (2) In determining whether a trade union to which subsection (1) applies has met the requirements of subsection 8(2), the Board need not have regard to any increase in the number of employees in the bargaining unit after the application was made.

The section applies to the construction industry. Because the representation vote in the construction industry is a snapshot of the views of the employees who worked on the application date, 'build-up' has no role in that industry. By implication, 'build-up' has a role in sectors of the economy other than construction.

25. Section 111(5) of *the Act* reads,

111. (5) Where the Board determines that a representation vote is to be taken amongst the employees in a bargaining unit or voting constituency, the Board may hold the additional representation votes as it considers necessary to determine the true wishes of the employees.

The Board endeavours, subject to the consideration that representation votes be held promptly, to ensure that representation votes are as representative as possible. But if it is apparent to the Board that a representative vote is not truly representative, the Board may order a second representation vote. A 'build-up' is one circumstance in which section 111(5) of *the Act* still has application.

26. Reviewing these contrary indications, we accept that the build-up doctrine retains its efficacy under *Bill 7*, as it did previously.

Prejudice

27. The employer argues that the union suffers no prejudice by a delay of about 8 weeks between the representation vote on April 8, 1997 and a second more representative vote which would occur if we find the 'build-up' principle has application. In contrast, the prejudice to the employees who were not in employment on April 8, 1997 and who will be working by the end of May 1997 is substantial. The interests of both sets of workers - those in employment then and those newly employed - would both be recognized if a second, more representative vote were ordered.

28. The union's counsel submits that a second representation vote will cause prejudice. The certainty of the earlier vote would be jeopardized if a second vote were ordered. The union would not influence the date of the vote, an entitlement which is substantially entailed by the manner in which the voting date is determined under section 8(5) of *the Act*. Effect would not necessarily be given to the intention expressed by a majority of the employees who cast ballots on April 8, 1997. The union would not have had access to employees newly recruited shortly prior to the second vote, particularly if there were to be a short period between the ordering of the second vote and its occurrence. If the period were not short, then there would be room for campaigning and for the kinds of problems which are anticipated and proscribed by section 11 of *the Act*.

29. We are not satisfied that every potential prejudice need be considered in making this determination. In our view the proper balancing of respective interests is between those of the existing employees and of the employees who had no part in the earlier representation vote. That balancing has generally been resolved in the Board's jurisprudence on the basis of whether the existing employees represent a majority of the eventual complement of employees. If so, their interests prevail; if not, then the interests of the anticipated employees prevail. We accept that standard.

Calculating representativeness

30. The employer has established certain elements of the 'build-up' test. The employer's decision to rapidly expand the number of employees in the bargaining unit was taken prior to it receiving the union's certification application. It was a genuine decision based upon business exigencies and operational requirements and it was unrelated to the union's organizing campaign. There is a real likelihood of a rapid increase in the number of employees and it will occur before the end of May 1997 - certainly within a reasonable period. See *F. Lepper & Son Ltd.*, above, ¶¶8-10. The staff increase does not depend upon factors outside of the employer's control. The growth in numbers is part of the employer's organizational plan; it does not depend upon any outside influence or determinant.

31. The problematic portion of the employer's 'build-up' argument concerns the calculation of the growth in employment. Are we to adopt the 'increase in positions' approach advanced by the employer (which could result in a finding of a 'build-up'), or do we have regard to the growth in the total number of employees, as advanced by the union (which would usually not have that result)?

32. The union argues that the employer cannot approbate and reprobate: the employer is willing to accept an all-employee bargaining unit, when it might have contended for separate full-time and part-time units; the employer was willing to include the part-time (on-call) employees in the count for the purposes of determining who would participate in the representation vote on April 8, 1997; yet, now that the union has been successful, the employer wishes to change the ground rules - it now wants the Board to have regard only to the number of full-time employees - and, in the union's submission, it should not be permitted to do so.

33. We accept the union's argument. If we were dealing with a full-time only bargaining unit, then the employer's argument might be persuasive. But we are not. We are dealing with an all-employee unit, which consists of full-time and part-time employees. Each employee has the same status in the bargaining unit, whether they be full-time or part-time. They had an equal vote in the representation vote and there is no reason why they should not now be treated as equivalent. The fact that the full-time employees have definite positions and work on specified shifts, while the part-timers work only as 'call-in' employees on an as-needed basis, does not mean that they are not employees. The employer itself has accepted that they are employees by including them in the representation vote that occurred on April 8, 1997.

34. Furthermore, the evidence suggested that the employer will consider its “on-call” pool of part-time employees to fill the newly created full-time positions. They were invited to apply for the full-time positions. We can assume that some of the new full-time positions will be filled by employees from the “on-call” pool. They have already expressed their opinion on the union’s certification application because they were entitled to vote in the representation ballot on April 8, 1997. Hence, while there has been a considerable growth in the number of full-time positions from what existed on April 8, there has not been a commensurate growth in the number of employees. The parties estimated that the number of part-time employees would remain constant between April 8 and the end of May 1997. In our view, given the change in the employer’s employment orientation from an on-call pool to a regular full-time complement, that is likely to be an over-estimation of the eventual number of on-call employees. These observations suggest that the figure of a 41% build-up in the number of employees is probably on the high side. Nevertheless, accepting that the build-up figure will be 41%, that is not sufficient to meet the usual test of 50% applied in ‘build-up’ cases.

35. In light of this determination, we find that the growth in the number of employees to be engaged by the end of May 1997 does meet the test of the ‘build-up’ principle. Accordingly, there has not been sufficient build-up of employees to warrant a second representation vote.

36. The union is in a certifiable position as a result of the representation vote of April 8, 1997 a certificate will issue.

37. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

38. Meetings and hearing dates previously arranged are hereby cancelled.

39. The employer should ensure that copies of this decision be posted on employee noticeboards at its workplaces so that the decision comes to the attention of the company’s employees. The copies should remain posted for a period of 30 days from the date hereof.

DECISION OF BOARD MEMBER, J. A. RONSON; June 17, 1997

1. Bill 7 radically changed the approach that our Board must take in certification proceedings. To my knowledge, this is the first “build-up” case to be decided by the Board under Bill 7.

2. When we certify a group of employees at the wish of less than 30% of their number, we give short shift to our build-up cases prior to Bill 7, and we ignore completely the present wishes of the Legislature.

3. I would order another vote, so the persons directly affected by union representation could tell us what they want.

0831-96-R; 0834-96-U IBEW Construction Council of Ontario, and IBEW Local 773, Applicant v. Pietro Electric Limited, Responding Party

Certification - Certification Where Act Contravened - Construction Industry - Discharge - Discharge for Union Activity - Remedies - Unfair Labour Practice - Board finding that employer violated the Act when it discharged union’s two key supporters - Board finding

membership support adequate for collective bargaining where union had signed up 2 employees out of 10 in bargaining unit and where union applying for ICI bargaining rights - Board finding that other requirements under section 11(1) also satisfied - Certificates issuing - Board also directing reinstatement and compensation for infringement of statutory rights, even if offer of reinstatement declined and even if the discharged employees were otherwise employed through entire period - Board also declaring that union entitled to conduct two meetings with employees during working hours, in the absence of the employer

BEFORE: *Robert Herman*, Alternate Chair.

APPEARANCES: *Craig Flood* and *Andrew Stokes* for the applicant; *Arthur Barat*, *Pietro D'Agostini*, *Guiliano Querqui*, *Anthony Laposta* and *Mario Barberio* for the responding party.

DECISION OF THE BOARD; June 2, 1997

1. This is an application for certification, in which the applicant relies upon the provisions of section 11 of the *Labour Relations Act, 1995*, and a related complaint filed pursuant to section 96 of the Act, in which the applicant/complainant alleges that the responding employer has breached sections 70, 72, 76 and 86 of the Act. The alleged unfair labour practices relate to the discharges of two union supporters, and a wage increase given during the statutory "freeze".

The Facts

2. Pietro D'Agostini started Pietro Electric Limited ("Pietro Electric") around 1969. Pietro Electric is a relatively small electrical contracting company working in both the residential and the industrial, commercial and institutional ("ICI") sectors of the construction industry in and around Windsor, Ontario. Although the Board was not provided with evidence of the ownership arrangement with respect to Pietro Electric, it is clear that D'Agostini is the effective owner of the company, and acts as its chief executive officer and general manager. It is his business, and he runs every aspect of it.

3. Since approximately 1970, the Christian Labour Association of Canada, Local 53, ("CLAC") has been bargaining agent for the employees in the bargaining unit in question, apprentice and journeymen electricians employed by Pietro Electric. At the time the incidents that follow occurred, there were approximately eight to eleven employees in the bargaining unit, most of them apprentice electricians.

4. For some time, the applicant (the "IBEW") had been unhappy that Pietro Electric was represented by a local of CLAC. The IBEW believed that the IBEW was the appropriate union to represent apprentice and journeymen electricians, and it was intent upon trying to obtain bargaining rights for Pietro Electric. At one point in February, 1996, while CLAC still represented employees, the IBEW picketed a major project in Windsor that the company was working on, an ICI electrical installation job in the new Windsor Star building. The picketers complained about Pietro Electric working on the project, since the company was not an IBEW company, and since the IBEW did not view CLAC as a "real construction trade union".

5. The picketing created some concern amongst the employees of Pietro Electric, and they wanted their union, CLAC, to help. In what was a telling response to the disruption caused by the picketing, the employees did not themselves contact CLAC. Guiliano Querqui, the company's working foreman, was one of two company employees working on the Windsor Star project when the picketing took place. Querqui asked D'Agostini to phone CLAC, to see why there was an IBEW picket line around the site, and to see what CLAC could do to assist the men. D'Agostini did contact CLAC but

even so, no one from CLAC showed up at the site or spoke to the men until several days after the picket line appeared.

6. This delayed response by CLAC upset the employees, and suggested to them that CLAC was not properly representing their interests or protecting their rights. Any potential consternation about CLAC was no doubt enhanced by comments made by D'Agostini around the same time. He told at least some of his men that Pietro Electric was unable to compete if something didn't happen. He told them that they all had to do something about the situation, because if Pietro Electric couldn't compete, it would have to close its doors. He told them that he couldn't effectively bid on IBEW jobs, nor could the company survive another three years with a collective agreement with CLAC, and if this continued, the company would have to close down.

7. Querqui arranged for a meeting of all the employees, to see about taking steps to decertify CLAC. The meeting was held in the company's office, for which Querqui had the keys. At that meeting, attended by most, if not all, of the employees, one of the employees advised the assembled group as to what wages and benefits D'Agostini would be able to pay if CLAC were to be decertified. He spoke to the men as if speaking on behalf of D'Agostini.

8. All the employees except one expressed the view that they wanted to decertify CLAC. Brian Fields, one of the employees later discharged, was alone in his view that the employees ought to continue to have CLAC represent them. It does not appear as if the other discharged employee, Richard Arboleya, was at the meeting, and indeed, it is unclear if he was working for the company at that time, having been laid off previously and not yet recalled.

9. The collective agreement with CLAC was due to expire at the end of April, 1996, and it included a wage increase, effective as of April 15, 1996. Pietro Electric implemented some, but not all, of the raises as required under the collective agreement.

10. An application for decertification of CLAC was filed with the Board. There was no evidence led in the instant proceeding which dealt with what the issues were in that decertification application. Accordingly, the Board does not know whether CLAC challenged the decertification or whether any of the events described formed part of the decertification proceedings. In any event, on April 25, 1996, a decertification vote was held. The vote results were seven in favour of decertification, one opposed. Only Fields voted against the decertification, and although the vote was conducted by secret ballot, all the employees were aware of everyone else's views and how they had voted, presumably because they had chosen to share this information with each other. D'Agostini was also made aware by a number of his employees that Fields alone had voted against decertifying CLAC.

11. Towards the end of April, Richard Arboleya was recalled to work by the company to work on the Windsor Star project. He had begun working for the company in mid-January, 1996, when he was hired as a construction labourer. Shortly thereafter, he had been asked by D'Agostini to sign on as an apprentice electrician. He worked for a while at various small projects for the employer, but was laid off approximately two months later. Because of the timing of his recall, he was not eligible to vote in the decertification vote of CLAC, and he did not do so.

12. On or about May 6, 1996, the Board issued its decision terminating the bargaining rights of CLAC, Local 53. Also on that day, although coincidentally, Pietro Electric hired two new electricians, Anthony Laposta and Mike Piazza. Both these individuals were hired on loan from another electrical contracting company, Rose City Electric ("Rose City"). Work was slow at Rose City and it did not need them at the time, but Pietro Electric did, so the two companies arranged that Laposta and Piazza would work for Pietro Electric for a while. They were hired on the basis that they were to shuffle between

Pietro Electric and Rose City as needed, and in any event, Laposta (at least) was to return to Rose City by June 10, 1996.

13. Also around this time, the IBEW began its campaign to organize the now unrepresented electricians working for Pietro Electric. The regional organizer for the IBEW Construction Council of Ontario, Andrew Stokes, had actually been phoned earlier by a CLAC representative, and told that a decertification application had been filed. The CLAC representative thought the IBEW should try to represent the employees if it turned out that CLAC was decertified. The union had also been contacted by Fields, who had learned through a friend about the IBEW, and had phoned after the CLAC decertification vote had been held.

14. Fields and Arbolea met with Stokes on May 6, 1996, to discuss organizing the bargaining unit at Pietro Electric. At that meeting, both Fields and Arbolea signed membership cards in the IBEW. Stokes asked the two of them to begin speaking to fellow employees about signing cards in the IBEW. Neither was given blank cards, however, as the arrangement was that Fields and Arbolea were only to discuss joining the union with the employees, and were to see if any of them were interested in signing up for the IBEW.

15. Both Fields and Arbolea did this. Fields approached a number of employees, on a number of occasions, to try to encourage them to sign up with the IBEW, or at least to speak to Stokes about doing so. Arbolea approached one or two employees to the same effect. Although the two men only approached some of the employees, the bargaining unit was quite small and all employees were fully aware that both Fields and Arbolea were talking to employees about the possibilities of signing with the IBEW.

16. D'Agostini was also fully aware of this by early May, as he had been so told by some of his employees. Indeed, Querqui and another relatively senior employee, Mario Barberio, had both told D'Agostini that Fields had been bothering employees in his efforts to get them interested in the IBEW. D'Agostini advised them to leave Fields alone.

17. A few of the employees approached by Fields or Arbolea expressed some interest in the IBEW. One or two indicated that they would be interested in meeting Stokes. To this end, Fields and Stokes set up a meeting for May 14th or 15th, 1996, so the employees could meet Stokes and discuss the union and whether they wished to sign with the IBEW. Although all employees were invited to this meeting by Fields or Arbolea, not a single employee showed up, other than Fields and Arbolea. One employee told Arbolea later that he and the guys were afraid that if they came to the meeting they might be terminated for doing so.

18. Around the beginning of June, 1996, Stokes and Fields set up another meeting and again invited all the employees to attend. Again, only Fields and Arbolea attended.

19. By June, the only meaningful amount of work the company had was at the Windsor Star project. During this period, largely because of delays in approving work orders, there was some slowdown in the work, and employees were not as busy as they had been. Lay-offs became a possibility, and employees were aware of this.

20. Laposta and Piazza were the employees with the least seniority, and both were in any event on temporary loan from Rose City. On Thursday, June 6, 1996 Laposta, who was to be returned to Rose City by the following Monday, June 10, 1996, received a lay-off notice from Pietro Electric. The notice advised Laposta that he was being laid off because of shortage of work, effective as of the end of the next day, Friday, June 7th, and that he was to return to Rose City as of next Monday. Piazza received a similar lay-off notice.

21. Laposta did not go into work the next day. Instead, he phoned Querqui (the working foreman) to ask if he could remain with Pietro Electric for at least a couple more weeks. Laposta told Querqui he preferred to work for Pietro Electric, since he preferred doing ICI work, and Rose City did residential. Querqui told Laposta he would get back to him. Later that afternoon, Querqui phoned back to advise Laposta that he would not be laid off and that he could return to work on Monday. Laposta did return on the Monday, and he continued to work as if he had not been laid off. It appears as if Piazza's lay-off was effective.

22. The next two least senior employees were Arboleya and Fields. On June 10, 1996, Arboleya had worked a full day, and around 5:00 p.m. was cleaning up, together with two other employees, in an upstairs room at the Windsor Star. D'Agostini came into the room and asked Arboleya to step outside the room for a moment. There D'Agostini gave Arboleya a notice of lay-off, due to shortage of work. Outside the hearing of the others, he told Arboleya that he knew there were people in the company trying to get the IBEW in, and that he had heard that Arboleya had signed a card with the IBEW. D'Agostini also asked Arboleya if he had signed with the IBEW. Arboleya denied that he had and said that he had merely talked to the IBEW. Of course, Arboleya had in fact already signed a card on May 6, 1996. D'Agostini did not believe Arboleya's denial and told him that he knew he signed a card and that he knew Arboleya was lying to him. D'Agostini told Arboleya that he had no choice, that he had people in the company trying to organize the union and he didn't want a union shop, and he had no choice but to lay-off Arboleya. D'Agostini also told Arboleya that he was aware that there was someone else in the company who had signed a card, and that he too would be taken care of. D'Agostini then instructed Arboleya to grab his tools and leave the job. As Arboleya was leaving, D'Agostini told him that he might call him back at some point.

23. Arboleya left the upstairs room and went downstairs, where he told two other employees what had just happened. He told them D'Agostini had accused him of signing with the union and had laid him off, and had told him that he didn't want anyone with the company who wanted the union in.

24. The facts set out in the preceding two paragraphs were testified to by Arboleya. The responding party did not challenge this testimony, either through evidence it led or through questioning of Arboleya or other union witnesses.

25. Also on Monday, June 10, 1996, a number of employees were given raises. Laposta was one of them, and he received the raise that he had asked for several weeks before. Rather than being laid off, as he had been notified the previous Thursday, Laposta returned to work with a raise of approximately \$2.50, to a rate of \$15.50.

26. Laposta was a personal friend of Arboleya's, and later that night, Arboleya phoned Laposta and told him of the events of the afternoon. Arboleya also told two other employees that evening what had happened. He also spoke to Fields, to tell Fields that D'Agostini had stated that he knew who the other person was who had signed a union card.

27. In turn, Fields phoned Stokes that night for advice as to what he should do, worried that he had been identified by D'Agostini as a union supporter, and worried that he also was about to be laid off or discharged. Fields told Stokes that he thought he would hide a tape recorder on his person during work, from that point on, to ensure he had evidence if there should be an incident or conversation with D'Agostini.

28. During the next few days, nothing unusual happened at work. All the employees would have been aware of what D'Agostini had done, and why. They knew he had laid off Arboleya because he had supported the union. During the balance of the week, the other employees kept their distance from Fields. They avoided him where possible, and did not willingly talk to him.

29. On Thursday, June 13, 1996, around 10:30 a.m., Fields was given a lay-off notice in the envelope with his pay cheque. The notice said the lay-off was due to shortage of work. As he had all week since Arboleya's lay-off, Fields had a tape recorder hidden on his person that day. Sometime shortly after noon, Fields confronted D'Agostini in the electrical room. Querqui was also there at the time. Fields showed D'Agostini his lay-off note, and asked D'Agostini for an explanation.

30. A heated conversation then took place between the two of them, with Querqui as witness, in which D'Agostini lost his temper. D'Agostini was unaware he was being taped by Fields (D'Agostini did not at the hearing dispute the accuracy or reliability of the tape recording, and did not dispute that the conversation recorded on the tape took place). He told Fields that he had given Fields time to change his mind, but Fields had not done so. D'Agostini said that he was aware that Fields had signed for the IBEW, and he had even given Fields a raise, but Fields had still not changed his mind. D'Agostini made it clear to Fields that he was being laid because he had signed for the IBEW and because he had been trying to organize other employees and had gotten someone else to sign for the union.

31. Fields left the work site immediately after this conversation. He contacted the union shortly thereafter, and the two instant applications (one for certification and the other a related unfair labour practice complaint) were served upon Pietro Electric by the union the following day, June 14, 1996, and filed with the Board shortly thereafter.

32. Several weeks later, both Arboleya and Fields were contacted by the company, and advised that the work had picked up and there was no longer a shortage of work, and both were offered an opportunity to be recalled. This offer was consistent with the position of the company, expressed both in the Response initially filed in these applications and in submissions made at the hearing. The employer's position was that both Fields and Arboleya were laid off only because of a shortage of work. When work picked up, submitted the employer, they were recalled. This position was maintained despite the evidence of the conversations that took place between D'Agostini and Arboleya and Fields, when they were each laid off, despite the fact that the discussion or argument that occurred in the latter case was taped, and despite the fact that neither conversation was denied by the employer. Quite apart from these conversations, however, there is no cogent evidence that work had in fact picked up in any respect as of the time of these recall offers.

33. Arboleya declined, telling the employer that after what had gone on with D'Agostini, he could not go back. Fields accepted the recall, but his return to Pietro Electric turned out to be of short duration. A few weeks after he returned, D'Agostini and he had another encounter, during which D'Agostini again discharged Fields. This time, D'Agostini asked Fields how far he planned on taking the applications or the hearings before the Board. D'Agostini told Fields that he didn't like the way that Fields was still trying to change everyone's mind, and that Fields was a bad influence on some of the guys, and he didn't want him around because of this. D'Agostini also said that he might be suing Fields personally, because of the tape recording that Fields had made when he was first laid off.

34. On these facts, the applicant submits that it should be certified, without a representation vote, based upon the provisions of section 11 of the Act.

The Decision

35. Section 11 reads as follows:

11.(1) Upon the application of a trade union, the Board may certify the trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

1. An employer, employers' organization or person acting on behalf of an employer or employers' organization has contravened the Act.

2. The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.
3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.
4. The trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board to be appropriate for collective bargaining.

(2) Upon the application of an interested person, the Board may dismiss an application for certification of a trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

1. A trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions has contravened the Act.
2. The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.
3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.

(3) The Board may consider the results of a representation vote when making a decision under this section.

(4) Subsections 10(1) and (2) do not apply with respect to a representation vote taken in the circumstances described in this section.

36. In support of its claim, the applicant asserts that sections 70, 72, 76 and 86 of the Act have been breached by the responding employer. Those sections read as follows:

70. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

72. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to

cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

76. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

86. (1) Where notice has been given under section 16 or section 59 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) 14 days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board.

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated, whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 16, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 59 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 48 applies with necessary modifications thereto.

37. We turn first to a consideration of the first requirement under section 11(1) of the Act, that the employer or a person acting on behalf of the employer has contravened the Act. Here, there is no question that several actions of D'Agostini, acting on behalf of Pietro Electric, constitute unfair labour practices, and are breaches of the Act.

38. We do not make any finding with respect to whether D'Agostini's statements to employees at the time of the picketing at the Windsor Star project in February, 1996, when CLAC Local 53 was still the bargaining agent, were breaches of the Act. He told his employees that they had to do something, as he was unable to compete, and if he had another three years of a collective agreement, he would

have to close down. We reach no conclusion about whether such statements are breaches of the Act because the union did not allege they were, and the proceeding was litigated on that basis. Nevertheless, the comments were made by D'Agostini and they did convey to employees his serious concern about remaining unionized, whether with CLAC or the IBEW. The effect of his comments, if nothing else, was to make manifest to employees that D'Agostini did not want to be unionized, that employees should take steps to see that Pietro Electric did not remain unionized, and that the consequences of failure to take such steps might be that the business, and their jobs, would disappear.

39. It was in this context that the lay-offs or discharges of Arboleya and Fields occurred (we refer to what occurred as either a discharge or lay-off, as a lay-off in these circumstances operates the same as a discharge). The union does assert that the statements made by D'Agostini and the discharges themselves constitute breaches of the Act.

40. The employer submits that Arboleya and Fields were laid off due to shortage of work, and because they were the least senior employees. This rationale is simply not tenable on the facts. Dealing first with Arboleya's discharge or lay-off, even if there was a shortage of work such that lay-offs were justifiable, it is clear that a prime motivation for selecting Arboleya for lay-off was his support for the IBEW. This is apparent both from the statements made by D'Agostini to Arboleya when he was laid off (that he was being laid off because of his support for the IBEW) and from the employer's agreement to rescind the lay-off of Laposta around the same time, even though Laposta was less senior, and was on loan from another company which expected him back as of June 10, 1996. No sustainable theory was proffered by the employer to explain how, if the lay-offs were by seniority, Laposta was kept on and Arboleya and Fields were let go. The Board concludes that Arboleya was laid off primarily because of his support for the IBEW. This constitutes a breach of sections 70, 72 and 76 of the Act.

41. Fields too was laid off or discharged because of his support for the IBEW, and his lay-off similarly contravened sections 70, 72, and 76 of the Act. D'Agostini had been aware since the CLAC decertification of Fields' support for a union, CLAC initially and subsequently the IBEW. D'Agostini had decided to give Fields a chance to change his mind, and when advised of Fields' organizing attempts by his senior employees, he told them to leave him alone. But Fields did not change his mind, and he continued to support the IBEW and to try to get additional employee support for it.

42. The employer submits Fields was laid off because of shortage of work, and on the basis of seniority. As well, the employer at the hearing led evidence to suggest that Fields was a poor employee, and did not perform his work properly. Apart from the fact that Fields' lay-off was not premised on poor work performance, either at the time or at the hearing, the evidence does not establish such poor performance. The comments earlier made about the Arboleya lay-off are similarly applicable here, and the proffered justification and explanation for Field's lay-off is not sustainable on the facts.

43. As he did with Arboleya, D'Agostini was unable to resist giving the true reason to Fields when he was laid off. He told Fields he was being laid off because he supported the IBEW, and because he was trying to organize his fellow employees. D'Agostini had just disposed of CLAC, and he was obviously extremely upset at the thought that he might shortly become certified by IBEW. He could not allow his, so he took concrete and effective steps to eliminate all known IBEW supporters from the work force. Within the space of a few days, he had sent a potent message to his employees: support the IBEW and you are gone.

44. After these lay-offs, the union took prompt action. It filed applications challenging the lay-offs, and relied upon them to ask for certification without a vote, pursuant to section 11 of the Act. Within a short time, D'Agostini was offering to recall the two discharged union supporters, on the alleged justification that the work had picked up. But the evidence did not substantiate an increase in the work available, nor did it demonstrate a need for two more electricians. The logical inference is that

they were recalled to try to repair the damage, so to speak, and to buttress the company's position that its actions had been motivated solely by shortage of work. However, D'Agostini apparently could not control his dissatisfaction with Fields and Fields' support of the IBEW, and he again discharged Fields, again linking Fields' continued support for the IBEW to the reason for his discharge.

45. All three of these discharges or lay-offs breached the Act. To fire someone because s/he supports a union strikes at the core of the rights given to employees under the Act, rights that give employees an opportunity to choose whether to be represented by a union, without fear of reprisals from their employer because they choose to exercise these rights.

46. In light of the findings with respect to the discharges of Arboleya and Fields, and what follows, it is unnecessary to decide whether any raises given during the freeze period contravened the Act.

47. The first requirement of section 11 is met. The employer has contravened the Act, as outlined above. There are three other requirements of section 11(1):

2. The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.
3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.
4. The trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board to be appropriate for collective bargaining.

48. Turning to the last clause, the type of assessment required by section 11(1)4 is to be contrasted with the general means of testing employee support in certification applications. In the typical certification, a representation vote is held and the wishes of the majority of the employees prevail. Support is measured on a strictly numerical basis, where the views expressed by the majority of the voters govern. Section 11(1)4, however, does not take this approach, and does not suggest that the Board perform a strictly numerical calculation. It is the ability to engage in "collective bargaining" that is at issue, not a head count of cards or other numerical measures of support (although, of course, in particular contexts these facts may be related). The Board is required to consider the *process* of "collective bargaining" and whether there is adequate support for that process. The level of support is measured against a functional criterion, and the Board assesses whether the level of support is such, in its opinion, that meaningful collective bargaining is able to occur. In this context, "collective bargaining" includes, at least, the negotiation of the first collective agreement.

49. In considering whether the level of employee support is adequate, the numbers of employees supportive of the union remains relevant, and as the level of demonstrable support drops, it may be less likely that certification under section 11 is appropriate. But that will be because at some level of support it will make little sense to license collective bargaining, because it is unlikely to be workable or sustainable. It will not be because the percentage of support is so low that that factor, standing alone, must mean that there is not "adequate support" for the purposes of collective bargaining.

50. The bargaining unit here works in the ICI sector of the construction industry, and it is ICI bargaining rights (along with all other sectors in a particular Board area: see section 158) that the applicant seeks to acquire. If the Board were to certify Pietro Electric, the company would immediately become bound to the pre-existing ICI provincial collective agreement for electricians and electricians' apprentices, and be in a position to bargain for sectors other than the ICI. The parties to this application

would not only not be required to bargain with respect to the ICI sector (which is the great majority of the work of the company) consequent upon certification, they would be precluded from doing so according to provisions of the Act, which require that the two designated provincial union and employer bargaining agencies bargain for the single provincial agreement.

51. Here, the union had signed up two employees out of (approximately) ten in the bargaining unit. Even so, the Board is satisfied that the level of support demonstrates adequate membership support for the purposes of collective bargaining. The fact that eight of the employees did not sign cards does not justify an inference that collective bargaining is not adequately supported, since there will be no actual bargaining in the ICI sector for some time, it will not take place in any event between the parties, and a collective agreement in this sector will instantaneously apply upon certification. Insofar as the other construction sectors are concerned, unions and employers often never bargain for sectors in which the employer does not meaningfully work, and in any event, that bargaining will proceed separately and independently of ICI bargaining. Because of the effect of the imposed ICI agreement, which requires the employment of union members, and because the only work currently being performed by the company is ICI, the work force will all be union members when or if bargaining begins for the other sectors.

52. We are therefore satisfied that the condition in section 11(1)4 has been met.

53. We turn next to section 11(1)2. Is the impact of the unfair labour practices such that a representation vote would not likely reflect the true wishes of the employees in the bargaining unit?

54. D'Agostini discharged two employees because of their support for the union. When he did so, he explicitly linked their support for the IBEW to their lay-offs. These discharges occurred in a small work force, of approximately 10 employees. The news of the discharges, and the reasons for this, were communicated to a number of employees directly, and would have been known in short order by all the employees. If the message sent by the discharges was unclear, uncertain, or implicit in any respect, D'Agostini repeated and reinforced it when he fired Fields for a second time, after his recall, and for the same reason, because he continued to support the IBEW.

55. Threats to the job security of employees or, as here, actual discharges, linked to support for the union have long been considered by the Board to be unfair labour practices which have such a strong and deep rooted impact that even a representation vote in which ballots were confidentially cast would not reflect the true wishes of employees. Indeed, as the Board recently stated in *Wal-Mart Canada Inc.*, [1997] OLRB Rep. Jan./Feb. 141, at paragraph 49 therein:

... This case is a classic example of a situation in which the conduct of the employer changes the question in the minds of the employees at the vote ... from one of union representation to one of "do you want to retain your employment" (see in this regard *Stratton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801; *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848; *Knob Hill Farms Limited*, [1987] OLRB Dec. 1531; and *Beaver Lumber*, [1992] OLRB Rep. May 553).

56. To similar effect, in the construction industry context, the Board recently stated in *Balkan Glass & Aluminum Inc.*, [1996] OLRB Rep. Sept. 717, at paragraph 21 therein:

... We are satisfied that the nature of the contravention here is such that a representation vote would not likely reflect the true wishes of the employees in the bargaining unit. The Board has in the past automatically certified an applicant where the actions of an employer have been of the nature of threats to close the business should the employees support the union. Here threats such as these were followed by lay-offs designed to convey to employees the direct and immediate cost of their failure to comply with the employer's directions in this respect. The message to employees would be clear: that the employer would actively take steps to ensure that employees were penalized should they support the union, that those steps included immediate discharge, and that a vote for

the union would be an invitation to further reprisals. In these circumstances, the Board concludes that the true wishes of employees would not likely be reflected through a representation vote.

57. For reasons similar to those expressed in the above-quoted cases, the Board concludes that the results of the contraventions here are such that a representation vote would not likely reflect the true wishes of employees in the bargaining unit. This employer, through D'Agostini, has sent a message to his work force. D'Agostini began speaking to his employees back in February, 1996, when IBEW was picketing at the Windsor Star project. He told his men they had to do something about the company having a collective agreement, and a union, and that if the men didn't, the business might close. He must have been extremely upset to see his goal potentially thwarted, when an IBEW organizing campaign began almost immediately after CLAC was decertified. D'Agostini was at first content to leave the two union supporters alone. A number of his men were keeping him informed and the campaign was not gaining ground. Of course, this is hardly surprising, given the messages D'Agostini had already sent to his men. Then he lost patience and he fired the only union supporters at the company. He then fired one of them again, for continuing to support the union. The previous choices of employees in casting their ballots (the CLAC decertification vote) had become known to D'Agostini, and D'Agostini obviously knew about the IBEW campaign and its supporters. A vote for the union might well be perceived by employees as a vote that they would be the next to be laid off. In these circumstances, employees would not be voting in an atmosphere and in an environment that would enable them to freely express their true wishes.

58. The remaining question is whether the third precondition of section 11(1) has been established: whether any other remedy, including the taking of a representation vote, would be sufficient to counter the effects of the breaches of the Act committed by the employer.

59. For a significant number of years, the *Labour Relations Act* has contained a section by which the Board has a discretion to automatically certify, even though a specified minimum level of membership support had not been attained. Both the pre-Bill 40 version of this section (section 8) and the Bill 40 version (section 9.2) granted the Board this power. Both sections were parts of an Act where certification was ordinarily granted on the basis of majority support amongst employees as demonstrated by filed membership cards or applications for membership. Bill 7 represents a departure from the historic membership card approach, for now certification (other than under section 11) flows from majority support as demonstrated through a representation vote. The vote is now the presumptive mechanism for acquiring bargaining rights through certification. And for the first time, there is the *explicit* requirement described in section 11(1)3.

60. When it considers whether to use its power to certify in an extraordinary manner, to certify automatically without allowing employees the otherwise mandated right to exercise their choice through a representation vote, the Legislature has directed the Board to ask whether any remedial response other than certification will effectively repair the damage resulting from the employer's unlawful behaviour, and will allow a fair representation vote to occur. This is an inquiry that the Board often engaged in prior to the new Bill 7 provision, but consideration of this question is now made mandatory. Section 11(1)3 engages the Board in a consideration of its full remedial arsenal, and invites an assessment of whether any type of relief might be appropriate. Indeed, given the wording of section 11(1)3, which requires the Board to consider whether *any* remedy can cure the injury occasioned by the breaches of the Act, it may be that the Board's remedial powers have been enhanced.

61. The employer in this case denied that it had committed any unfair labour practices, but in the alternative, if the Board concluded that it had, it submitted that the appropriate remedial relief was to direct a representation vote. In the employer's submission, even if the unfair labour practices had been committed, the employees were still able to freely express their wishes in such a vote. The employer also submitted that perhaps (if the Board were to conclude that it was the lay-offs which were

the unfair labour practices) it was appropriate to prohibit the employer from any further lay-offs except in circumstances that the Board could stipulate (which circumstances were not suggested by the employer), and that such a restriction on any further lay-offs would remain in effect pending the results of the representation vote. There was one further remedy suggested by the employer, which we mention only parenthetically, and that was its suggestion that the Board issue an order prohibiting the union from engaging in any further surreptitious tape recording at the work site.

62. For remedies to be effective, they must repair the damage or injury. In order to assess the likelihood of this, one must consider the statutory rights that the employer has violated and the consequences of the breaches. The union has had its legally protected right to seek to organize, without improper interference, effectively nullified by the employer's statements and actions. The employees have been precluded from exercising their right to freely choose whether to be certified through the statutory mechanism of a representation vote. They have had their right not to be discriminated against because of their views about unionization made meaningless by the employer's conduct. They have had their right not to be threatened or coerced about their views and about the expression of their views ignored and abused.

63. Section 11 is designed to protect these rights. It seeks to ensure to the extent possible that employers do not interfere with the free exercise of choice by employees in the bargaining unit. It creates a disincentive for employers to interfere with union and employees' rights, because the effect of such interference may be an imposition by the Board of the very result the employer unlawfully sought to avoid. Any remedial relief, to effectively eradicate the effects of the unlawful behaviour, must address these concerns and must re-establish the primacy of the rights in issue, and critically, must reassure and convince employees that their rights will be protected. Is there a remedy, or a series of remedies, which would re-establish the ability of employees to freely express their wishes, when the employer has so interfered with statutory rights and so tainted the workplace that employees at this point would be voting on their own job security?

64. D'Agostini helped to orchestrate decertification of the previous trade union, CLAC, and virtually all of the employees would have been aware of this. He made his views clear to all employees, that he might have to close down the company if it remained unionized. He discharged the only two IBEW supporters because they supported the IBEW, because they were unwilling to change their minds, and because they were trying to influence other employees to support the union. All or virtually all of the employees would have been aware of these circumstances as well. He then fired one of the union supporters for a second time, for continuing to support the union. The company, run by D'Agostini, then fabricated a story and maintained it during the proceedings at the Board, including through the sworn testimony of D'Agostini. The company maintained that it did not breach the Act, and that the lay-offs were the result solely of lack of work, and were done on a straight seniority basis. This position was maintained even though the company did not dispute that D'Agostini had made the statements attributed to him when he fired Arboleya and Fields, when he told them he was doing so in part because of their support for the union. D'Agostini has demonstrated a long-standing and continuing antipathy to unions, including the IBEW, and a long-standing pattern of taking active steps to be and remain union free, including discharging employees who thought otherwise.

65. D'Agostini has sent a message to employees that their job security and their rights cannot be protected by the union, and supporting the union would mean they would be discharged. His conduct has effectively stopped the IBEW campaign and the legal right of the IBEW to be able to solicit support has been made practically meaningless by D'Agostini's behaviour. Any remedial relief that seeks to correct the consequences of these unfair labour practices must be able to meaningfully reassure employees that their job security will not be at risk, and that they can exercise their rights under the

Act. Unless they can be assured that a vote for the union will *not* lead to their firing, a representation vote will not be fair.

66. Unfortunately, because of D'Agostini's conduct, there is no remedy that would counter the effects of the unfair labour practices. No remedy can provide the necessary security and reassurance to employees that will serve to correct the effects of his breaches of the Act. His pattern of behaviour has been so invasive and destructive, and has so ignored or trampled upon the legal rights of employees in concrete and visible ways, that no remedy can sufficiently reassure employees that they will be able to freely express their views in a representation vote, without fear of reprisals.

67. In reaching this conclusion, we have considered the suggestion of the employer that the Board issue an order or orders which would preclude the company from laying off any other employees, except in circumstances as stipulated by the Board, pending the representation vote. However, given the long history of the employer's attempts to influence employees, the discharges of Arbolea and Fields and the second discharge of Fields, the circumstances under which each of them were discharged, and the employer's continued refusal to acknowledge its responsibility or fault in any manner, it is quite improbable that such a remedy would be effective.

68. In the result, we are satisfied that no corollary remedial relief is sufficient to counter the effects of the contraventions of the Act. Accordingly, all the preconditions of section 11 of the Act have been met, and certificates will issue forthwith pursuant to section 11.

69. The application itself shows the "IBEW Construction Council of Ontario" as applicant in the style of cause. That entity is neither the Employee Bargaining Agency nor an affiliated bargaining agent, according to the designation issued by the Minister, and it is not therefore apparent that certificates should issue in its name. However, in paragraph 1(a) of the application form, the applicant is identified not only as the IBEW Construction Council of Ontario, but also as the IBEW, Local 773. Local 773 is an affiliated bargaining agent. The applications for membership filed in support of the application are applications for membership in Local 773. Since Local 773 is named as an applicant, is an affiliated bargaining agent, and the memberships are in its name, it is appropriate that the name of the applicant be clearly identified as including Local 773. Accordingly, pursuant to section 112 of the Act, the name of the applicant is amended to include IBEW Local 773, and the certificates will be issued in its name.

70. A certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario in respect of all electricians and electricians' apprentices in the employ of Pietro Electric Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

71. A certificate will issue to the applicant trade union in respect of all electricians and electricians' apprentices in the employ of Pietro Electric Limited in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

72. Both Arbolea and Fields are to be offered reinstatement forthwith, and compensated for any losses. The matter of their reinstatement and compensation is remitted to the parties for their consideration. Since neither Fields nor Arbolea may be willing to return to work for Pietro Electric at this stage, and since reinstatement as a remedy has in any event limited utility in a construction industry context, they shall each be entitled to reasonable compensation for the infringement of their rights, even

if they decline the offer of reinstatement, and even if they were otherwise employed throughout the entire period in question.

73. The union shall be entitled to conduct two meetings with employees, of 1 hour each, during working hours and for which employees will be paid their usual rates. The meetings will take place in the absence of D'Agostini or anyone acting on behalf of Pietro Electric. These meetings are to take place within 30 days of the date of this decision.

74. All employees are to receive a copy of this decision, to be provided by the union. The decision will tell them of the employer's breaches of the Act, and how those breaches have led to the automatic certification of the employer.

75. The Board will remain seized with respect to all matters, remedial or otherwise, arising from its decision.

1687-96-OH; 1881-96-OH Selwyn Pieters, Applicant v. Toronto Board of Education, Responding Party v. Canadian Union of Public Employees, Local 134, Intervenor; Selwyn Pieters, Applicant v. Toronto Board of Education (Plant Operations), Responding Party v. Canadian Union of Public Employees, Local 134, Intervenor

Evidence - Health and Safety - Practice and Procedure - Board permitting applicant's representative to tape record proceedings subject to certain specific restrictions regarding use of the recording - Applicant employee alleging that he was harassed and discriminated against by his employer on the basis of his race and that he suffered reprisals for having exercised rights under the Occupational Health and Safety Act ("OHSA") - Board declining to hear proffered "factual" and opinion evidence to establish that racial harassment and discrimination may constitute a hazard under OHSA and that the Ontario Human Rights Commission ("OHRC") is failing to exercise its jurisdiction under the Human Rights Code - Board declining to inquire into application because application in essence a complaint about race discrimination and because that matter should be dealt with by OHRC - Application dismissed

BEFORE: *Kevin Whitaker*, Vice-Chair, and Board Members *S. C. Laing* and *H. Peacock*.

APPEARANCES: *Selwyn Pieters* and *H. Kopyto* on behalf of the applicant; *Stephen C. Raymond*, *Cindy-Ann Thomas*, *Lilianna Simonetta* and *Tony Eichhorn* for the responding party; *Judith McCormack*, *Howard Goldblatt*, *Steve Lillico*, *John Weatherup* and *Dave Smith* for the intervenor.

DECISION OF THE BOARD; May 21, 1997

I

A Brief Overview

1. The applicant in this matter claims that he was harassed and discriminated against by his employer on the basis of his race. Both applications involve the same parties and are brought pursuant to section 50(2) of the *Occupational Health and Safety Act* (the "OHSA"). The applicant's theory is that he was subject to reprisals by his employer for having exercised rights under the OHSA.

2. The applicant has not brought a concurrent complaint before the Ontario Human Rights Commission (the "Commission") alleging that he has been discriminated against contrary to the provisions of the *Ontario Human Rights Code* (the "Code").

3. All parties agree that both the Board and the Commission exercise a concurrent jurisdiction over the subject matter of these applications. The applicant has chosen to bring his concerns to the Board rather than the Commission because he believes that the Commission will fail to properly enforce the provisions of the Code.

4. The respondent as a preliminary issue, takes the position that the Board should defer to the Commission as the real issue here is whether the applicant was discriminated against in a manner which is contrary to the provisions of the Code. The applicant and the intervenor (the applicant's bargaining agent) oppose the respondent's preliminary motion. The principal argument put forward is that if the Board defers to the Commission, it is in effect deferring to a forum which has abdicated its statutory responsibilities. The applicant and intervenor suggest that if a complaint were made to the Commission, it would either simply fail to deal with it or defer the matter back to the Board.

5. For reasons which comprise the balance of this decision, the application is dismissed.

Preliminary Matters

6. Aside from the respondent's motion to defer to the Commission, there were a number of other preliminary matters.

7. The applicant's representative requested permission to produce a tape recording of the proceeding. This request was made because of a disability which would prevent him from taking handwritten notes. Over the objection of the respondent, the Board ruled orally:

Mr. Kopyto is permitted to create an audio tape recording of these proceedings for his own personal use only, and subject to the following restrictions:

- (1) the tape recording created is not to be held out by Mr. Kopyto, the applicant, anyone on their behalf or any other party or person as a record of these proceedings or as a transcript of the proceedings;
- (2) Further, any tape recording created is not to be published or distributed to any other persons, and is to be used only for the purposes of refreshing Mr. Kopyto's memory in the context of his personal use as the applicant's representative in this matter.

8. Leave was granted to withdraw the application in Board File No. 1687-96-OH as it was completely subsumed in the application filed subsequently in Board File No. 1881-96-OH.

9. The respondent initially took the position that the Board should defer to the grievance arbitration process as the intervenor had filed a number of grievances on behalf of the applicant which dealt with the subject matter of these applications. The intervenor and the applicant withdrew the grievances and the respondent withdrew this preliminary argument.

10. With the grievances withdrawn, the respondent took the position that if the matter were to proceed on the merits, it would object to the participation of the intervenor.

11. The applicant wished to call evidence in dealing with the respondent's motion to defer to the Commission. The applicant proposed to call both factual and opinion evidence to establish two things:

1. that racial harassment and discrimination could constitute a “hazard” for purposes of the OHSA, and;
2. that the Commission continues to fail to properly exercise its jurisdiction under the Code.

12. The intervenor took the position that as the evidence was arguably relevant, it should be permitted.

13. The respondent objected to the proposed evidence. The respondent suggested that the evidence was not only irrelevant, but that the Board had no jurisdiction to inquire into the competence of the Commission.

14. Following argument, the Board ruled orally:

Having heard the submissions of the parties, we have decided not to permit the applicant in dealing with the respondent’s preliminary motion, to lead any evidence on the issue of whether or how the Commission exercises its jurisdiction under the Code.

If the respondent’s motion were to succeed, and the Commission were to subsequently deal with a claim by the applicant in a manner inconsistent with the Code, the applicant would have his remedies elsewhere.

Given the parties’ agreement that racial discrimination and harassment may constitute a “hazard” under the OHSA, it is not necessary to hear evidence on this point.

15. On consent of the parties, the applicant was granted leave to amend the application to include events which took place after it was filed on September 30, 1996.

II

The Facts

16. For purposes only of dealing with the respondent’s preliminary motion, we accept the facts as alleged by the applicant.

17. The applicant was hired by the respondent as a Caretaker, on June 24, 1996. His last active day of employment was September 23, 1996. The applicant was dismissed on December 18, 1996.

18. The substance of the applicant’s complaint is that he was subjected to both physical and non-physical hazards in his workplace, sought the protection of the OHSA and suffered reprisals for it.

19. The non-physical hazards consisted of a pattern of racial harassment and discrimination. The physical hazards included such things as defective machinery, toxic fumes, and an absence of training.

20. The reprisals were for the most part, further acts of racial discrimination and harassment.

21. The recital of allegations is prefaced by the assertion that “From the time that the Applicant commenced work ...he was subjected to a pattern of conduct and to physical and other conditions at the workplace which constituted a hazard to his health”. Further, that the hazards “included a poisoned work environment”.

22. The application then goes on to provide detailed allegations which describe the conduct of the respondent at particular times from August 7, through to December 18, 1996.

23. The detailed allegations include a description of racist comments made to the applicant by supervisors. It is also alleged that the applicant was treated by his doctor for stress caused by a “racially poisoned work environment”.

24. The application alleges that there were six discrete incidents where the applicant was exposed to physical workplace hazards;

1. August 7, 1996, electric shock from a broken “wet vacuum”;
2. July 29 - August 8, 1996, exposure to second hand cigarette smoke in the lunchroom;
3. August 8, 1996, dermatitis from toxic fumes;
4. September 2, 1996, assigned to Heydon Park School without being advised concerning the school’s “surveillance” system, evacuation procedures or fire alarm system;
5. September 6, 1996, assigned to Old Orchard Park School with the same concerns described in point “4” above;
6. September 4, 1996, assigned to cut grass with a lawn mower without being properly trained or instructed in its usage.

25. The applicant claims to have been acting in compliance with the OHSA as a result of the following conduct:

1. Having failed to cut grass with a lawn- mower (work refusal);
2. Having failed to attend disciplinary meetings (work refusal);
3. Having requested protective equipment and appropriate supervision;
4. Having filed the application (section 50(2)).

26. The application then describes the discipline received by the applicant culminating in his dismissal of December 18, 1996.

27. Following the detailed allegations, the application states that the respondent’s conduct “constituted reprisal actions as a result of his (the applicant’s) actions in compliance with the OHSA, seeking the enforcement of the OHSA or intending to give evidence in a proceeding to enforce the OHSA...”. The application then asserts “The applicant states that he is an African-Canadian and that the differential conduct described above was motivated in part by antagonism against him by reason of such attributes”.

III

The Respondent’s Deferral Argument

28. The respondent agreed with the applicant and intervenor that the Board had jurisdiction over the application. It argued however that section 50(3) of the OHSA provided the Board with a

discretion as to whether it should inquire into an application brought under section 50(2). The respondent suggested that in these circumstances, the Board should exercise its discretion under section 50(3) by deferring to the Commission, thereby declining to inquire.

29. The respondent took the position that the application did not allege that the applicant suffered reprisals for having exercised rights under the Act with respect to the physical hazards described in paragraph “24” above. In the absence of facts which would establish a nexus between these physical hazards and reprisal conduct, the respondent argued that the allegations concerning physical hazards should be struck from the application. What would be left of the application would constitute allegations that are purely in the nature of racial discrimination and harassment. According to the respondent, these matters are clearly within the domain of the Code and should be before the Commission. The respondent relied upon the Board’s decision in *Musty v. Meridian Magnesium Products Limited*, (“*Meridian*”), [1996] OLRB Rep. Nov./Dec. 964.

30. In the alternative, the respondent argued that if the portion of the application dealing with physical hazards was not struck, the application was principally about racial harassment and discrimination. In these circumstances, the Board should still defer to the Commission on the theory that the dominant character of the matter brought it within the provisions of the Code.

The Applicant’s Response on Deferral

31. The applicant took the position that the Board should always inquire into an application where a *prima facie* case for a breach of section 50(1) of the OHSA is made out in the pleadings. Alternatively, the applicant argued that where an application alleges that the workplace hazards which led the applicant to exercise rights under the OHSA are “mixed” in that they consist of both physical hazards as well as the hazards of discrimination and harassment, the Board should inquire into it.

32. The applicant also argued that it would be pointless to defer to the Commission as it would completely fail to properly exercise its jurisdiction under the Code. The applicant suggested that pursuant to its discretion under section 34(1)(a) of the Code, the Commission would in fact defer to the Board or a board of arbitration, as it was likely to determine that the matter was more appropriately dealt with under the *Labour Relations Act, 1995* (the “Act”).

33. The applicant relied upon the Board’s decision in *Pauline Au v. Lyndhurst Hospital*, [1996] OLRB Rep. June 456.

34. The intervenor supported the applicant’s position on the deferral issue.

IV

Striking the Physical Hazards

35. The respondent argued that there was no nexus linking the alleged physical hazards with reprisal conduct and that this portion of the application should be struck. The applicant and intervenor suggested that the application reveals such a nexus.

36. The parties provided the Board with a detailed analysis of the grammar and construction of the text of the application. Each suggested that a plain language reading of the application supported their position.

37. In our view, the application contains an element of ambiguity. It is possible to construct a reasonable argument that would support either the respondent’s or the applicant’s position on this issue.

38. It is arguable that the application states a *prima facie* case with respect to the allegations of physical hazards. In these circumstances, we are not prepared to strike those portions of the application. It must be remembered that the statutory provisions invoked by the applicant are remedial legislation. Worker applicants under section 50 of the OHSA cannot be held to the drafting standards of legal counsel.

39. Accordingly, we reject the respondent's submission that a portion of the application should be struck.

Deferral-The Analysis in Meridian

40. Having failed to convince us that a portion of the application should be struck, we turn to the respondent's alternative argument which is that we should defer to the Commission in any event, having regard to the entirety of the application.

41. The respondent concedes that if the application was merely based upon an allegation that the applicant suffered reprisals for having sought to exercise his rights under the OHSA with respect to the physical hazard components of the application, the Board should inquire into it. It is argued however that the larger context painted by the application must inform the Board's characterization of the alleged physical hazards. On this view, the application is about issues of harassment and discrimination, despite allegations dealing with physical hazards.

42. As we have observed, the respondent relies upon the Board's reasoning in *Meridian*. The applicant suggests that *Meridian* is wrong, that *Lyndhurst* stands for the contrary principle and should be followed.

43. In *Meridian*, the Board dealt with an application under section 50(2) of the OHSA where the hazard which led the applicant to pursue her rights under the OHSA as well as the reprisal conduct was alleged to be sexual harassment. The applicant had filed a concurrent complaint with the Commission, dealing with the same subject matter. There were no allegations of physical hazards apart from the incidents of sexual harassment.

44. The respondent in *Meridian* argued that the Board should exercise its discretion under section 50(3) of the OHSA by deferring to the Commission, thereby declining to inquire into the application. In dealing with this motion, the Board undertook a comprehensive comparative analysis of the Code, the OHSA and the respective roles of the Commission and the Board under their legislation. The substance of the analysis appears at paragraphs 147 to 161 of that decision:

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147. The Code contains provisions dealing with the precise conduct in question in this case (including alleged reprisals), as well as provisions mandating a range of responses and remedies that can be deployed by the Commission and/or a board of inquiry. Those proscriptions and prescriptions are both clear and specific. They deal with the underlying cause of the problem, the question of reprisals, and the issues of inaction and potential repetition. And they contemplate (and permit) a more broadly-based approach to the question of a "poisoned work environment".

148. By contrast, even under an expansive interpretation of the OHSA, this Board has only a narrow residual role in this area - and then only in respect of a reprisal (if there is one) connected to the exercise of statutory rights (if that is really what the complainant was doing in this case).

149. In my view these specific legislative pronouncements, and the availability of an alternative *statutory* tribunal to deal with such matters, both suggest that that is the way that the Legislature has intended that issues of this kind should be addressed - even though there is an argument that this Board may have jurisdiction too. Human rights issues were intended to be dealt with by the

Human Rights Commission under the *Human Rights Code* - not by this Board under the OHSA. And that is an additional reason why this Board should exercise its discretion not to hear this complaint - in effect, to defer to the Code and the Commission.

150. There is nothing startling about one tribunal declining to embark upon litigation because there is an alternative forum available - particularly if that forum seems more appropriate, and, as here, seems to have been designed by the Legislature to deal with precisely those issues. Even the Courts, which have an inherent common law jurisdiction, have sometimes stayed a civil action when the subject matter of the case appeared to be a human rights issue that was the subject of concurrent litigation before the Commission. In such cases, there was usually no question that the Court had *jurisdiction* to proceed if it wished to do so. Rather, the question was whether it *made sense* to proceed, given the potential for duplication of effort, overlapping remedies, and inconsistent findings.

151. In my view, these are factors that a statutory tribunal can also take into account, along with the apparent legislative intent and the public and private costs involved in overlapping litigation.

152. Nor are such notions of “deferral” foreign to the Board’s own jurisprudence, or to the exercise of the Board’s unfair labour practice jurisdiction that is given to the Board by its governing statute (and incorporated to some extent into the OHSA via sections 50(2) and 50(3)).

153. For many years the Board has had a “policy” of deferring to arbitration when the essence of an alleged unfair labour practice complaint is the breach of a negotiated collective agreement (see the decision of the Board in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254). This deferral policy is rooted in section 49 of the *Labour Relations Act* which creates a presumption in favour of arbitration for the resolution of such matters - even though, to the extent that there is an alleged breach of the *Labour Relations Act*, they could also be addressed under section 93 of the Act.

154. Section 56 of the *Labour Relations Act* that makes a collective agreement “binding”, so that any refusal to comply with the terms of a collective agreement might “arguably” be considered a breach of the Act. Indeed, the Board has sometimes enunciated that view. And there will be plenty of circumstances where an alleged breach of the collective agreement might also be characterized as an unfair labour practice, so as to fall within the “jurisdiction” of the Board. However, by and large, the Board has been reluctant to pre-empt the primary process of dispute resolution contemplated by the Legislature, even though the Board has exclusive jurisdiction to interpret and apply the *Labour Relations Act* and has much broader powers than a Board of Arbitration. The Board has jurisdiction, but it has not been inclined to exercise it when the scheme of the Act suggests that another forum is to be preferred.

155. It appears to me that the same kind of approach is advisable where, as here, the Legislature has so clearly designated the Commission as the primary forum for dealing with problems of this kind. If anything, there is a stronger case for deferral where the rights in issue are so clearly addressed, where the alternative forum has its own *statutory* framework, where the *statutory* remedies appear to be broader than those this Board could give, and where the OHSA jurisdiction is debatable. In this respect, the situation here is not like deferral to a privately negotiated process like grievance arbitration. Rather, the Board is recognizing the role of another statutory body with its own specific legislation and public mandate in this area. And while I do not think that the “practicalities” of the situation should necessarily govern the result, neither should the Board take a parochial approach and ignore the problems of (potentially) overlapping jurisdictions.

156. The modern workplace is now subject to an array of arguably overlapping statutes, which, in turn, can foster multiple litigation in different forums arising out of the same basic work setting. The instant case is a classic example, involving (among other things) a request for compensation in the Courts, and broadly similar or related relief under three separate statutes (Workers’ Compensation, the OHSA, the Code) administered by several different statutory agencies and tribunals (the WCB and WCAT, the Human Rights Commission and a board of enquiry, and the Ontario Labour Relations Board). And if the OHSA applies generally, as Ms. Musty says it does, one could add inspectors from the Ministry of Labour and the adjudication/appeal procedures under the OHSA as well.

157. This checkerboard of statutory rights and remedies is not only a recipe for inconsistent results as each agency or tribunal sifts through the facts from its own perspective, but in the circumstances, I do not think that it is inappropriate to consider the public and private costs of an exercise in which several statutory agencies are all being called upon to look at, and potentially litigate about, the same behaviour. On the contrary, it appears to me to be entirely appropriate that before plunging ahead, one tribunal should take into account what another tribunal is doing or was designed to do.

158. Now, of course, Mr. Kopyto is quite correct that in each forum and under each statute the rights, remedies and procedures are different. For example, in the Courts and under the Code, Ms. Musty can get or may have to pay "costs". Before this Board she cannot obtain costs nor does she have to worry about paying them. In the Courts, Ms. Musty can (potentially) get punitive damages or significant sums for mental distress, while neither this Board nor a board of inquiry give punitive damages, compensation for mental distress under the Code is capped at \$10,000, and this Board has no established practice of compensating employees for stress. Under the Code there are special remedies for harassment situations including continuing supervision of the workplace, but there is also a full right of appeal to the Courts on all matters of fact or law. Under the OHSA, there is no similar remedy specified and no similar right of appeal, but the Board's decision is protected by a privative clause. Under the OHSA the Ministry of Labour can move directly to prosecute persons who have breached the OHSA, while under the Code, a quasi-criminal prosecution requires the consent of the Attorney-General. By contrast, the *Workers' Compensation Act* is a no-fault scheme which, if triggered, precludes other statutory and common law remedies once it is determined that a disabling condition really is related to the situation in the workplace (and not other aspects of an employee's life).

159. However, in my view, this jurisdictional jumble merely illustrates the problem, and is something that the Board should take into account before embracing a novel legal proposition, and generating another layer of litigation.

160. I do not think that it is necessary to multiply the examples. The fact is, what this case is really about is sexual harassment in the workplace and what is necessary to remedy that situation - both for Ms. Musty herself, and for other employees working in the allegedly "poisoned work environment". This is not an area in which this Board can claim any specific expertise, and it is debatable whether there is a foundation for intervention under the OHSA - and then only if the circumstances fit the narrow, no-reprisal provisions of section 50. And if a breach of section 50 were established, there is no reason to believe that this Board's remedial authority is as broad as that of the Commission or a board of inquiry - or that this Board could even impose the range of remedies that Meridian has already agreed to. This Board has never undertaken its own investigations, organized or imposed anti-harassment programs, supervised a workplace on a continuous basis, inserted a "just cause" clause into a collective agreement or contract of employment, invested a health and safety committee with quasi-judicial powers to adjudicate discrimination complaints, ordered an employer to punish a supervisor, or even given significant damages for mental distress.

161. Whether or not these particular remedies are available under the Code in this case, I think that it is clear that the Commission and/or a board of inquiry are better situated to deal with these problems than this Board is under section 50 of the *Occupational Health and Safety Act*. Indeed, since Meridian says that it is trying to get the grievor back to work, and the grievor says that it is first necessary to rectify the poisoned work environment, the central issue in this case is not reprisal or reinstatement but rather remedying harassment and gender discrimination - something that falls squarely within the central jurisdiction of the Commission under the Code. The situation in this case is not unlike that before the Board in *David Gazit v. Ontario Public Service Employees' Union and George Brown College*, (Board Files 0616-95-U and 0617-95-U), where the Board declined to enquire into the complaint and observed:

... All of Mr. Gazit's concerns are, at root, his assertion that he has been subjected to an ongoing pattern of discriminatory treatment by reason of his age, creed, and sex. His concern about a "poisoned work environment" all stem for what he has consistently asserted are human rights violations.... Even assuming that the withdrawal of [the Human Rights complaints] might be a factor in my determination, the complaints were extant when the issue was put before me. Mr. Gazit is forum shopping. It is inappropriate, and an enormous waste of public and private resources. All of the concerns that Mr. Gazit

has raised are before the Human Rights Commission. The remedies he seeks are also more within the ambit of the Commission's usual and often broader, remedial work.

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45. The Board in *Meridian* drew two important conclusions. Firstly, that sexual harassment in the form raised by the application was arguably within the Board's jurisdiction under section 50 of the OHSA. Secondly, because the Commission's role under the Code was explicitly tailored to deal with issues of discrimination, the Board should defer to the Commission's process.

46. In coming to the second conclusion, the Board noted that the Code and the Commission's process, from investigation and mediation, through to adjudication and remedial authority, is constructed precisely to deal with the particular character of human rights issues. In contrast, the appropriate subject matter of the Board's inquiry under the OHSA is defined in broad and open ended terms.

47. The Board in *Meridian* assumed as a question of statutory interpretation that where two statutory tribunals have a concurrent jurisdiction, that the legislature must have intended the tribunal with the more specifically defined jurisdiction to deal with applications that on their face appear to fall within the more limited jurisdiction. The Board concluded that as the application before it was "really about" sexual harassment, it should defer to the Commission.

48. The application in *Lyndhurst*, as in *Meridian*, alleged acts of sexual harassment as both hazard and reprisal pursuant to section 50(2) of the OHSA. Unlike the present case, the respondent in *Lyndhurst* argued as a preliminary matter that sexual harassment could not be considered a hazard for purposes of the OHSA and that on this theory, no *prima facie* case was made out. The Board there, rejected the respondent's preliminary argument and proceeded to hear the matter on the merits.

49. The Board in *Lyndhurst* observed that neither party had requested that it defer to the Commission. At paragraph 66, the Board concluded that it would be inappropriate to defer to the Commission where neither party had raised the issue:

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66. As indicated in our July decision the Board considered staying the matter on its own motion in favor of the then outstanding complaint under the *Human Rights Code*. That application has now been discontinued, and we are no longer faced with the problems of two parallel proceedings and potential inconsistent findings. The Board is very much concerned with duplication of litigation, and might well have deferred this matter had the other proceeding not been ended. However, neither party argued for deferral even when the other complaint was outstanding; the employer opted not to make that motion. We are of the view that these are not the appropriate circumstances for the Board to do so of its own motion.

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50. The Board's decisions in both *Meridian* and *Lyndhurst* stand for the proposition that sexual harassment as hazard or reprisal conduct is arguably within the Board's jurisdiction when forming the basis of an application pursuant to section 50(2) of the Act. In *Meridian*, the parties raised the issue of deferring to the Commission and the Board decided that if the real issue is one of human rights, then there should be deferral. The majority decision in *Lyndhurst* does not address this point.

51. In our view, the reasoning in *Meridian* is incontrovertible. Unlike the respondent, we do not read *Lyndhurst* as being inconsistent with *Meridian*.

Meridian-Applied to Race Discrimination

52. The next question to be addressed is whether the deferral analysis in *Meridian* should be applied where the type of discrimination and harassment complained of is on the basis of race as opposed to gender.

53. The Code clearly prohibits discrimination and harassment on the basis of race. In section 5 of the Code, these prohibitions are expressly stated to apply in the workplace and with respect to employment:

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or handicap.

54. It is also the case that the Code prohibits reprisal conduct against a person for having attempted to assert rights under the Code including rights with respect to discrimination and harassment on the basis of race in the workplace:

8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

55. Part IV of the Code provides an extensive grant of authority to the Commission to receive complaints that the Code has been breached, to investigate and if necessary to seek adjudication. In particular, sections 32(1), 33(1) and 36(1) state the following, all of which apply to complaints of harassment and discrimination on the basis of race or reprisal conduct for the same, in the workplace:

32.(1) Where a person believes that a right of the person under this Act has been infringed, the person may file with the Commission a complaint in a form approved by the Commission.

33.(1) Subject to section 34, the Commission shall investigate a complaint and endeavour to effect a settlement.

36.(1) Where the Commission fails to effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry, the Commission may request the Minister to appoint a board of inquiry and refer the subject-matter of the complaint to the board.

56. Not only does the Code contemplate that the Commission should possess a particular expertise with respect to human rights matters, but there are provisions which expressly provide for a race relations expertise. Sections 28 and 29(f)(g) and (h) of the Code are as follows:

28.(1) The Lieutenant Governor in Council shall designate at least three members of the Commission to constitute a race relations division of the Commission and shall designate one member of the race relations division as Commissioner for Race Relations.

(2) It is the function of the race relations division of the Commission to perform any of the functions of the Commission under clause 29 (f), (g) or (h) relating to race, ancestry, place of origin, colour,

ethnic origin or creed that are referred to it by the Commission and any other function referred to it by the Commission.

29. It is the function of the Commission,

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- (f) to inquire into incidents of and conditions leading or tending to lead to tension or conflict based upon identification by a prohibited ground of discrimination and take appropriate action to eliminate the source of tension or conflict;

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- (g) to initiate investigations into problems based upon identification by a prohibited ground of discrimination that may arise in a community, and encourage and co-ordinate plans, programs and activities to reduce or prevent such problems;
- (h) to promote, assist and encourage public, municipal or private agencies, organizations, groups or persons to engage in programs to alleviate tensions and conflicts based upon identification by a prohibited ground of discrimination.

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57. Having regard to the provisions of the Code referred to above, the analysis in *Meridian* in our view applies equally to applications under section 50(2) of the OHSA which deal with issues of harassment and discrimination on the basis of race. There can be little doubt that the Legislature clearly intended the Commission to deal with complaints of harassment and discrimination in the workplace on the basis of race, including reprisal complaints.

Characterization

58. In *Meridian*, the question posed was “what is this case really about?”. We now deal with how this matter should be characterized.

59. Unlike the applications in *Meridian* and *Lyndhurst*, there are portions of this application based on allegations of physical hazards which are not expressly identified as acts of discrimination. This undoubtedly makes the task of characterization more difficult.

60. The theory of deferral assumes that an application can be characterized in a particular way and on that basis, dealt with by the appropriate tribunal. This exercise requires an assessment of what it is that a particular tribunal is supposed to be doing.

61. Under section 50 of the OHSA, the Board is supposed to determine whether an employee has been subject to a reprisal for having attempted to exercise rights with respect to health and safety in the workplace. The Commission’s role under the Code, is in a broad sense, to decide whether a person has suffered an act of discrimination. Is this application about one, or the other, or both? This is the choice which lies at the heart of the question of characterization posed in *Meridian*.

62. Reprisal conduct by definition is a response to some form of action. In the Board’s experience, reprisals for the purpose of section 50(2) of the OHSA usually occur after an employee attempts to exercise some statutory right concerning health and safety in a manner which brings this attempt to the attention of the employer. Most commonly, there is one or a number of discrete but obvious acts on the part of an employee to obtain some benefit under the statute concerning a health and safety issue. There is usually a temporal connection between the employee’s conduct and the reprisal.

63. The reprisal component of a complaint can take many forms. A reprisal is at its broadest, treatment to the employee's detriment. This may take a variety of forms, but to be a reprisal, it must always be some form of burden or disadvantage that is in response to the employee's conduct.

64. An act of discrimination may be like a reprisal to the extent that it is a burden or disadvantage. Part of the notion of discrimination however, is that the burden or disadvantage is not in response to conduct, but rather occurs in response to the personal and inherent characteristics of the individual. In *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at 174, McIntyre J., offered the following definition of the term "discrimination":

Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages not imposed on others, or withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

65. It is also the case that discrimination does not always appear on its surface to be a burden or disadvantage in response to personal characteristics. It is easy to say that receiving a racist comment from a co-worker is probably an act of discrimination (as well as harassment), but discrimination can also take the form of an unsafe work environment, or a lack of appropriate training. Indeed, adjudicators in human rights cases have recognized that findings of discrimination will usually be made on the basis of circumstantial evidence only. In *Human Rights in Ontario* (Carswell), 2d, 1992, Judith Keene at page 337 comments:

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It is a fact of life that, in most cases, discriminatory actions are not manifested openly before appropriate witnesses. Boards of inquiry have acknowledged the purpose of the legislation in accepting and drawing inferences from appropriate circumstantial evidence. One early case addressed the issue in some detail. In *Kennedy v. Mohawk College*, (1973) unreported (Ont. Bd. of Inquiry) the Board noted:

Discrimination on the grounds of race or colour are [sic] frequently practised in a very subtle manner. Overt discrimination on these grounds is not present in every discriminatory situation or occurrence. In a case where direct evidence of discrimination is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is in issue. This is not always an easy task to carry out. ...

66. Aside from what are probably acts of harassment as well as discrimination, it may not be possible to characterize a matter as either an act of discrimination or as a health and safety reprisal if one looks only at the disadvantage or detriment experienced by the applicant. The distinguishing characteristic will be what caused the treatment; was it conduct in the pursuit of rights under the statute, or rather, the applicant's inherent characteristics?

67. The application alleges that the applicant experienced detrimental treatment, "from the time the applicant commenced working..." and lasted for the entire period of his employment. Although there are arguably, allegations that the applicant took steps which were efforts to exercise rights under the OHSa (referred to in paragraph "25" above) it could not be said that these efforts would clearly be understood by the respondent to have that character. This is not definitive, but it is a factor to be considered in trying to decide what it is that this case is about.

68. In our view, the duration of the applicant's alleged detrimental treatment, the ambiguity surrounding the issue of whether the respondent would have known that the applicant was pursuing rights under the OHSA (except for the filing of the application itself), as well as the allegations of racist comments and verbal epithets, lead us to conclude that the application is in essence a complaint about race discrimination. The fact that the applicant alleges that he experienced physical hazards in the workplace does not mean that this is still not a complaint about discrimination. The presence of these allegations is consistent with the view that discrimination will manifest itself subtly, and usually be established by indirect or circumstantial evidence.

The Commission's Competence

69. It is clear that we have not considered any extrinsic evidence in determining that the Commission should more appropriately deal with this application than the Board. In our view, the correct approach in deciding this issue is to confine ourselves to a comparative statutory analysis. Questions concerning the Commission's competence should be left to the courts or the legislature, each in their own sphere.

70. There is little doubt and we would take administrative notice of the fact, that a number of communities have taken issue with the efficacy of the Commission. Even if we had permitted the applicant to call evidence to this effect, the Board is not competent to determine if the Commission is doing its job generally or more particularly, whether it is likely that the Commission would deal with the applicant's complaint in a manner consistent with the Code. It is not for the Board to take over the role of the Commission with respect to discrimination in the workplace, even if the Commission were to have failed to fulfil its mandate in this regard. That is also what this case is really about.

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71. The applicant is concerned that the Commission may defer to the Board or a board of arbitration. We can only observe that the applicant has elected to go before the Board rather than a board of arbitration, as he is entitled to do under section 50(2) of the OHSA. If he is entitled to make this election, it is difficult to see how he could be required to go before a board of arbitration. It also seems unlikely that the Commission would following our decision, send the matter back to the Board. Here as well as in *Meridian*, the Board has been at pains to explain why this type of application is more appropriately before the Commission. The Commission now has the benefit of our detailed reasoning on this issue which is the same one raised in a deferral pursuant to section 34(1)(a) of the Code.

72. Finally, in terms of the timeliness of the application were it to be brought to the Commission, we would note that the matter here was filed within days of the events in issue. The delay between the filing of the application and this decision is due to the Board's process and is in no way attributable to the parties' conduct.

73. The Board has in other cases deferred to another tribunal, but held a matter in abeyance pending a determination by the other tribunal. This may be appropriate where both the Board and the other tribunal exercise a similar expertise and have a concurrent jurisdiction. Given our characterization of the issues here, it is not appropriate for the Board to remain seized of the matter pending deferral to the Commission. For these reasons, we decline to inquire into this matter and the application is dismissed.

0560-97-R United Food and Commercial Workers Union, Local 1977, Applicant v. White Rose Crafts and Nursery Sales Limited, Responding Party

Certification - Representation Vote - Local of UFCW applying for certification - Employer asking for application to be dismissed without a hearing or a vote on ground that one-year bar in effect against UFCW as result of unsuccessful application made by it three months earlier - Employer asserting that UFCW and its local "one and the same" for purposes of the Act - In the alternative, employer asking for ruling on bar issue prior to directing vote - Board directing vote and noting that bar issue may be raised subsequently

BEFORE: *Timothy W. Sargeant*, Vice-Chair, and Board Members *S. C. Laing* and *H. Peacock*.

DECISION OF TIMOTHY W. SARGEANT, VICE-CHAIR, AND BOARD MEMBER H. PEACOCK; May 20, 1997

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act, 1995*.
3. The responding party asks that this application be dismissed "forthwith without recourse to a hearing". A certification application had been filed by the United Food and Commercial Workers International Union on February 21, 1997. A vote had been ordered and a decision issued March 14, 1997 which stated in part:
 5. The Board will not consider another application for certification by the applicant as bargaining agent of the employees in the bargaining unit until one year elapses from the date of decision.
4. The responding party submits that this is the same bargaining unit and that the applicant in the first application, the United Food and Commercial Workers International Union, and the applicant in this matter "are one and the same for the purposes of the *Labour Relations Act, 1995* (the "Act") and more specifically, subsections 10(3) and 111(2)(b) thereof".
5. In the alternative, the responding party requests "that the Board direct that no vote be held until a ruling can be made on this threshold question before incurring workplace disruption and uncertainty associated with the holding of a second representation vote, within less than three months, for the same group of employees".
6. The Board is not prepared to accede to either request. The matter of whether the bar set out in the decision of March 14, 1997 is effective against this applicant may be raised in accordance with paragraph 14 of this decision. Further, in the circumstances the Board will direct that a vote take place in accordance with principles set out in the *Corporation of the City of Toronto*, [1996] OLRB July-Aug. 552.
7. It appears to the Board on an examination of the evidence before it, that not less than forty per cent of the individuals in the bargaining unit proposed in the application for certification were members of the union at the time the application was made.
8. The Board directs that a representation vote be taken of the individuals in the following voting constituency:

all employees of White Rose Crafts and Nursery Sales Limited employed at 525 Hespeler Street, Cambridge, Ontario, N1R 6J2, save and except the manager, the assistant manager, persons above the rank of assistant manager, and summer seasonal employees.

9. The vote will be held on May 22, 1997. Other vote arrangements will be as determined by the Registrar and set out on the attached "Notice of Vote and of Hearing".

10. All individuals who had an employment relationship with the responding party in the voting constituency on May 14, 1997, the certification application filing date, are eligible to vote. Employees having an employment relationship on May 14, 1997, the certification application filing date, include employees who were not at work on that date, so long as there is a reasonable expectation of their return to employment.

11. There is a dispute between the parties as to whether or not the position of bookkeepers should be included in the bargaining unit. If any individual holding such a position wishes to cast a ballot, the individual shall identify himself or herself as occupying a disputed position and such individual shall then be entitled to cast a ballot. Any ballot cast by such an individual shall be segregated and not counted until the Board so orders or the parties agree.

12. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party.

13. The responding party is directed to post copies of this decision and of the "Notice of Vote and of Hearing" adjacent to each of the posted copies of the "Notice to Employees of Application for Certification". These copies must remain posted for 30 days.

14. Any party or person who wishes to make representations to the Board about any issue remaining in dispute which relates to the application for certification, including any matters relating to the representation vote, must file a detailed statement of representations with the Board and deliver it to the other parties, so that it is received by the Board within seven days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken.

15. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER S. C. LAING; May 20, 1997

Having regard to the issue raised by the employer, in my view the Board ought to seal the ballot box pending a determination of whether the Board should exercise its discretion to refuse to entertain a subsequent application by the applicant in respect of a bargaining unit whose members have, within the preceding year, been the subject of an unsuccessful application, and I would so order.

COURT PROCEEDINGS

0151-96-R (Court File No. 1181/96) Canadian Wildlife Federation, Applicant v. Jan Bureau and Vicki Page, on their own behalf and on behalf of a group of employees of the Canadian Wildlife Federation, United Steelworkers of America, Local 8327, Ontario Labour Relations Board, Respondents

Collective Agreement - Judicial Review - Parties - Termination - Timeliness - Board dismissing application to terminate bargaining rights after finding that document executed between union and employer was "collective agreement" - Application not brought during last two months of collective agreement and, therefore, untimely - Employer applying for judicial review - Divisional Court holding that employer without status to seek review of Board's decision - Judicial review application dismissed

Board decision not reported.

Ontario Court (General Division) Divisional Court, H. Smith ACJOC, Southey and Bell JJ., May 15, 1997.

H. Smith A.C.J.O.C. (endorsement): The Board's decision was given on an application for termination of bargaining rights under sec. 63(2) of the Ontario Labour Relations Act, which can be brought only by Employees. That application was dismissed. The Employees have *not* sought judicial review of the Board's decision.

In our opinion the Employer has no status to move to set aside the order of the Board in these circumstances (see *Re CLRB and Transair Ltd.*, (1977) 67 DLD(3d) 421,438; *American Barrick Resources Corp. v. USWA et al* (1991) 2 O.R. (3rd) 266, 268.

The application for judicial review is dismissed for lack of status in the Applicant.

Costs to the Respondent United Steelworkers fixed at \$3,000 to be paid by the Applicant Canadian Wildlife Federation.

3321-93-U (Court File No. 809/95) John Demetriades, Applicant v. Ontario Labour Relations Board and St. Joseph's Health Centre, Respondents

Discharge - Discharge for Union Activity - Judicial Review - Reconsideration - Unfair Labour Practice - Board exercising its discretion not to inquire into unfair labour practice complaint where substance of complaint and of grievances at arbitration overlapped, where allegation of anti-union motivation was before arbitration board and where arbitration board had complete jurisdiction to inquire into matter - Complaint dismissed - Request for reconsideration dismissed - Application for judicial review dismissed by Divisional Court

Board decision not reported.

Ontario Court of Justice (Divisional Court), Boland, Bell and Corbett JJ., June 5, 1997.

Boland J. (endorsement): Application is dismissed. Even if we were to consider the affidavits filed by the Applicant, we can find no error in the exercise of the Board's discretion in either of the decisions and the application is dismissed.

Costs to respondent, St. Joseph's Health Center, fixed in the sum of \$2500.00

4077-95-U (Court File No. 151/97) Power Workers' Union - Canadian Union of Public Employees, Local 1000 and J. Caskanette, G.D. Chaffey, M.D. Collins, L. Crausen, H.R. Gillies, R.C. Hansen, G. O'Donnell, J. Stark, R. Thoms, H. Tomsett and R.R. Young on their own behalf and on behalf of all members of the International Brotherhood of Electrical Workers, Local Union 1788, Applicants v. Ontario Labour Relations Board, **International Brotherhood of Electrical Workers**, Ken Woods, Allan Diggon, Tom McGreevy and International Brotherhood of Electrical Workers, Local 1788 by its Trustee, International Brotherhood of Electrical Workers and Ontario Hydro and Electrical Power Systems Construction Association and IBEW Electrical Power Systems Construction Council of Ontario, Respondents

Collective Agreement - Construction Industry - Judicial Review - Ratification and Strike Vote - Memorandum of settlement between union and employer in construction industry made contingent on ratification - Union submitting agreement to union's accredited delegates and not to employees in the bargaining unit - Board dismissing complaint alleging that provisions of section 79 of the Act requiring employee ratification in these circumstances - Application for judicial review dismissed by Divisional Court as premature

Board decision reported at [1996] OLRB Rep. Sept./Oct. 821.

Ontario Court (General Division) (Divisional Court), Hartt, McRae and Matlow JJ., June 23, 1997.

McRae J. (endorsement): The question of prematurity has been raised by counsel for the Board - we would have raised it in any event.

The Power Workers Union filed an unfair labour practices complaint with the Ontario Labour Relations Board alleging several violations of the Labour Relations Act by Ontario Hydro, the Association, the Council and Local 1788.

By agreement between the parties, the OLRB dealt firstly with the ratification issue (namely the alleged violations of sec. 79).

On September 30, 1996 the OLRB dismissed the part of the application dealing with that issue and directed the hearing to continue on other issues.

In our view the application is premature, the matter being inappropriate for judicial intervention at this time.

Application dismissed. No costs.

CASE LISTINGS APRIL 1997

PAGE

1. Applications for Certification	113
2. Applications for Declaration of Related Employer	128
3. Sale of a Business	129
4. Union Successor Rights	129
5. Applications for Declaration Terminating Bargaining Rights	130
6. Ministerial Reference (Board of Arbitration)	131
7. Applications for Declaration of Unlawful Strike	131
8. Applications for Declaration of Unlawful Strike (Construction Industry)	131
9. Complaints of Unfair Labour Practice	131
10. Applications for Interim Order	134
11. Applications for Consent to Prosecute	134
12. Applications for Religious Exemption	134
13. Jurisdictional Disputes	134
14. Applications for Determination of Employee Status	134
15. Complaints under the Occupational Health and Safety Act	134
16. Construction Industry Grievances	135
17. Applications for Reconsideration of Board's Decision	138

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1997

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0227-95-R: Construction Workers Local 53, CLAC (Applicant) v. 882870 Ontario Inc., operating as Advance Pipeline & Mechanical Contractors (Respondent) v. International Brotherhood of Electrical Workers, Local 773 (Intervener)

Unit: "all electricians, labourers, plumbers and pipefitters and welders in the employ of 882870 Ontario Inc., operating as Advance Pipeline & Mechanical Contractors in the Counties of Essex and Kent, save and except non-working foreman and persons above the rank of non-working foreman" (4 employees in unit)

0319-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 1137794 Ontario Inc. c.o.b. as Fort Erie Foodland (Respondent)

Unit: "all employees of 1137794 Ontario Inc. c.o.b. as Fort Erie Foodland in the Town of Fort Erie, save and except the Head Cashier and the Grocery Manager, and persons above the rank of Head Cashier and Grocery Manager" (39 employees in unit)

1760-95-R: Office and Professional Employees International Union (Applicant) v. The Corporation of the Township of Alberton (Respondent)

Unit: "all employees of The Corporation of the Township of Alberton in the District of Rainy River, save and except Clerk-Treasurer and Chief Building Official/By-Law Enforcement Officer, persons above the ranks of Clerk-Treasurer and Chief Building Official/By-Law Enforcement Officer" (2 employees in unit)

Bargaining Agents Certified Subsequent to Vote

2059-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local 195 (Applicant) v. Titan Tool & Die Ltd. (Respondent) v. The United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Intervener)

Unit: "all employees of Titan Tool & Die Limited in the City of Windsor save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (103 employees in unit)

Number of names of persons on revised voters' list	112
Number of persons who cast ballots	108
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	101
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	62
Number of ballots marked in favour of intervener	37
Number of ballots marked in favour of no union	1
Number of ballots segregated and not counted	7

3313-96-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rex Lumber Corporation (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of Rex Lumber Corporation in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and

carpenters' apprentices in the employ of Rex Lumber Corporation in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham" (8 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

3724-96-R: Shopmen's Local Union #834 of the International Association of Bridge Structural, Ornamental and Reinforcing Iron Workers (Applicant) v. Container Design Services (Respondent)

Unit: "all employees of Container Design Services at 366 Centre St., Petrolia, Ontario, save and except office, clerical and technical staff, foreman and persons above the rank of foreman" (33 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	33
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	11

3790-96-R: Ontario Public Service Employees Union (Applicant) v. Humber River Regional Hospital (Respondent)

Unit: "all medical laboratory technologists, laboratory assistants, ultra-sound and radiology technologists, respiratory technologists, nuclear medicine technologists, electroencephalograph technologists and electrocardiogram technicians of Humber River Regional Hospital in Metropolitan Toronto regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, members of the medical and nursing profession, office, clerical, service and other technical staff and students in training, and persons for whom any trade union held bargaining rights as of February 17, 1997" (83 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	83
Number of persons who cast ballots	30
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	4

3890-96-R: Laundry & Linen Drivers and Industrial Workers, Teamsters Local 847 (Applicant) v. Otema Store Interiors Ltd. (Respondent)

Unit: "all employees employed by Otema Store Interiors Ltd. in the Town of Markham, save and except plant supervisors, foremen, persons above the rank of plant supervisor, foreman, office and clerical staff, students employed during the school vacation period" (145 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	160
Number of persons who cast ballots	148
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	130
Number of segregated ballots cast by persons whose names appear on voter's list	18
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	69
Number of ballots marked against applicant	62
Number of ballots segregated and not counted	16

3948-96-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Ken O'Connor Building Materials Ltd. (Respondent)

Unit: "all employees of Ken O'Connor Building Materials Ltd. c.o.b. as Beaver Lumber in the City of Kingston, save and except Assistant Store Manager, persons above the rank of Assistant Store Manager, Accounting Manager, Head Cashier and Department Managers," (50 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	52
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	48
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	24

3954-96-R: Canadian Union of Public Employees (Applicant) v. The Simcoe County Roman Catholic Separate School Board (Respondent) v. The Simcoe County Roman Catholic Separate School Board Custodians (Intervener)

Unit: "all custodians employed at The Simcoe County Roman Catholic Separate School Board in the County of Simcoe and District Municipality of Muskoka, save and except Area Co-ordinators, persons above the rank of Area Co-ordinator and students employed during the school vacation period" (94 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	93
Number of persons who cast ballots	94
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	84
Number of segregated ballots cast by persons whose names do not appear on voters' list	10
Number of ballots marked in favour of applicant	43
Number of ballots marked in favour of intervener	41
Number of ballots segregated and not counted	10

3955-96-R: Canadian Union of Public Employees (Applicant) v. Childhood Community Resource Centre (Respondent)

Unit: "all employees of Childhood Community Resource Centre in the City of Windsor, save and except supervisors, persons above the rank of supervisor, program administrator, administrative assistants" (71 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	81
Number of persons who cast ballots	72
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	56
Number of segregated ballots cast by persons whose names appear on voter's list	16
Number of ballots marked in favour of applicant	52
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	16

3957-96-R: Canadian Union of Public Employees (Applicant) v. International Care Corporation c.o.b. as Churchill Place (Respondent)

Unit: "all employees of International Care Corporation at Churchill Place, save and except Supervisors and those above the rank of Supervisor, Bookkeeper, Receptionists, Activity and Marketing Representatives" (35 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	31

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	6

4104-96-R: Masonry Council of Unions Toronto and Vicinity (Applicant) v. 1000690 Ontario Inc. o/a Liza Homes (Respondent)

Unit: "all construction labourers in the employ of the responding party in all sectors of the construction industry, save and except the industrial, commercial and institutional sector, in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

4115-96-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 959613 Ontario Ltd. dba Super 8 Motel - Mississauga (Respondent)

Unit: "all employees of 959613 Ontario Ltd. dba Super 8 Motel - Mississauga employed at 5585 Ambler Drive in the Municipality of Mississauga, save and except Supervisors, persons above the rank of supervisor and co-op students" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	3

4116-96-R: United Food and Commercial Workers International Union (Applicant) v. Coca-Cola Bottling Ltd. (Respondent)

Unit: "all employees of Coca-Cola Bottling Ltd. employed in distribution/warehousing/equipment service in the City of Chatham, save and except managers and those above the rank of manger, zone supervisors, office and clerical staff and persons regularly employed for not more than twenty-four hours per week" (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	39
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	15

4127-96-R: Labourers' International Union of North America Local 183 (Applicant) v. Apollo 8 Maintenance Services Limited (Respondent)

Unit: "all employees of Apollo 8 Maintenance Services Limited employed at 3300 Bloor Street West, Central, East and West Towers, Etobicoke, save and except non-working forepersons, persons above the rank of non-working foreperson, office and clerical and sales staff" (25 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	25
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Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	3

4135-96-R: United Food and Commercial Workers International Union (Applicant) v. Women's Health in Women's Hands - Community Health Centre (Respondent)

Unit: "all employees of Women's Health in Women's Hand - Community Health Centre in the Municipality of Metropolitan Toronto, save and except: supervisors, persons above the rank of supervisor, confidential receptionist/ secretary, community health physician(s) and community support worker/office manager" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	1

4142-96-R: United Food & Commercial Workers Union, Local 175 (Applicant) v. Rick's Gas Tank Factory Ltd. c.o.b. as Rick's Gas Tank Factory Ltd. and Radiator Warehouse (Respondent)

Unit: "all employees of Rick's Gas Tank Factory Ltd. c.o.b. as Rick's Gas Tank Factory Ltd. and Radiator Warehouse in the Municipality of Ottawa-Carleton, save and except Production Manager, all those above the rank of Production Manager, office and clerical staff" (85 employees in unit)

Number of names of persons on revised voters' list	70
Number of persons who cast ballots	62
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	60
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	2

4163-96-R: International Brotherhood of Electrical Workers Local 1730 (Applicant) v. Northwest Ontario Recycle Association a.k.a NORA (Respondent)

Unit: "all employees of Northwest Ontario Recycle Association a.k.a. NORA at the Recycle Processing Plant at the Town of Dryden Landfill, Highway 502 in Van Horne Township, save and except Recycle Coordinator and persons above Recycle Coordinator" (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	2

4177-96-R: Ontario Nurses' Association (Applicant) v. Riverside Health Care Facilities Inc. at Emo Health Centre (Respondent)

Unit: "all registered and graduate nurses engaged in a nursing capacity by Riverside Health Care Facilities Inc. at Emo Health Centre in the Town of Emo, save and except the Director of Services and persons above the rank of Director of Services" (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	7

4200-96-R: Laundry & Linen Drivers and Industrial Workers, Teamsters Local 847 (Applicant) v. 1212224 Ontario Limited c.o.b. as Party Packagers (Respondent)

Unit: "all employees of 1212224 Ontario Limited c.o.b. as Party Packagers at its retail store outlet at 1225 Finch Ave. W. in Downsview, save and except Department Managers, persons above the rank of Department Manager, office, clerical, administrative and corporate staff" (38 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	2

4202-96-R: United Steelworkers of America (Applicant) v. Earl C. McDermid Limited (Respondent)

Unit: "all employees of Earl C. McDermid Limited in the Municipality of Metropolitan Toronto, save and except Supervisors and persons above the rank of Supervisor, office, clerical and sales staff" (58 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	60
Number of persons who cast ballots	57
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	57
Number of ballots marked in favour of applicant	51
Number of ballots marked against applicant	6

4208-96-R: Service Employees' Union, Local 210 (Applicant) v. St. Joseph's Health Services Association of Chatham, Incorporated (Respondent)

Unit: "all stationery engineers and their helpers in the employment of St. Joseph's Health Services Association of Chatham, Incorporated at Chatham, save and except Director Engineering Services and Supervisor Engineering Services" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	0

4255-96-R: Ontario Nurses' Association (Applicant) v. Oshawa General Hospital (Respondent)

Unit: "all Placement Co-ordinators employed by the Oshawa General Hospital for its Placement Co-ordination Services in Whitby, save and except Directors, persons above the rank of Director and employees in the bargaining

units for which any trade union held bargaining rights on March 18, 1997” (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	4
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	2
Number of ballots marked in favour of applicant	2

4257-96-R: United Steelworkers of America (Applicant) v. London Humane Society (Respondent)

Unit: “all employees of the London Humane Society in the City of London, save and except animal health supervisor/manager, inspector/manager, persons above the rank of animal health/supervisor/manager and inspector/manager, volunteer coordinator/executive assistant and accounting supervisor (payroll)” (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	14
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	2

4271-96-R: Labourers’ International Union of North America (Applicant) v. Grilo Roofing & Maintenance (Respondent)

Unit: “all construction labourers and carpenters and carpenters’ apprentices in the employ of Grilo Roofing & Maintenance in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters’ list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

4275-96-R: Ontario Nurses’ Association (Applicant) v. Victorian Order of Nurses (Respondent) v. Practical Nurses Federation of Ontario (Intervener)

Unit: “all registered and graduate nurses employed by Victorian Order of Nurses in the City of Guelph, the counties of Wellington and Dufferin, save and except supervisors and persons above the rank of supervisor” (84 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	83
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	44
Number of ballots marked in favour of applicant	37
Number of ballots marked against applicant	7

4277-96-R: Brewery, General and Professional Workers’ Union (Applicant) v. Women’s College Hospital (Respondent) v. United Plant Guard Workers of America (Intervener)

Unit: “all security guards employed by Women’s College Hospital in the Municipality of Metropolitan Toronto, save and except Chief Security Officer and persons above the rank of Chief Security Officer” (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	9
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Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0

4300-96-R: Local 636 of the International Brotherhood of Electrical Workers (Applicant) v. Donald Choi Canada Limited (Respondent)

Unit: "all employees of Donald Choi Canada Limited in the City of Cambridge, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (48 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	66
Number of persons who cast ballots	64
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	43
Number of segregated ballots cast by persons whose names appear on voter's list	21
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	21

4308-96-R: Graphic Communications International Union, Local 100-M (Applicant) v. Dover Industries Limited (Respondent)

Unit: "all employees of Dover Industries Limited, Howell Packaging Division in the City of Brampton, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, and excluding employees in any bargaining units in respect of which any trade union held bargaining rights as of March 24, 1997" (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	1

4309-96-R: United Steelworkers of America (Applicant) v. Neill-Wycik Co-operative College Inc. (Respondent)

Unit: "all security guards of the Neill-Wycik Co-operative College Inc. in Metropolitan Toronto, save and except Residence Life Manager, persons above the rank of Residence Life Manager and persons for whom any trade union held bargaining rights as of March 21, 1997" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	7

4314-96-R: United Steelworkers of America (Applicant) v. Presvac Systems (Burlington) Limited (Respondent)

Unit: "all employees of Presvac Systems (Burlington) Limited in the City of Burlington, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and security guards" (46 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	42

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	42
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	14

4326-96-R: I.W.A. - Canada (Applicant) v. Skyway Lumber Co. Ltd. (Respondent)

Unit: "all employees of Skyway Lumber Co. Ltd. in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2

4340-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Kingston Dodge Chrysler (1980) Ltd. (Respondent)

Unit: "all employees of Kingston Dodge Chrysler (1980) Ltd. in the City of Kingston, save and except supervisors, persons above the rank of supervisor, office, clerical new and used car sales staff and students employed during the school vacation period" (40 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	40
Number of persons who cast ballots	39
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	0

4341-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. General Motors of Canada Limited (Respondent)

Unit: "all employees of General Motors of Canada Limited at its Cold Weather Development Centre in the Town of Kapuskasing, save and except associate coordinators, persons above the rank of associate coordinator, office, clerical and sales staff" (58 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	58
Number of persons who cast ballots	58
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	56
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	25
Number of ballots segregated and not counted	2

4342-96-R: Ontario Public Service Employees Union (Applicant) v. Morton Youth Services, Orolea Hall (Respondent)

Unit: "all employees of Morton Youth Services, Orolea Hall, in the Township of Oro-Medonte, save and except supervisors and persons above the rank of supervisor" (21 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	2

0024-97-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. KML Engineered Homes Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of KML Engineered Homes Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of KML Engineered Homes Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	4

0025-97-R: United Steelworkers of America (Applicant) v. Grand & Toy Limited (Respondent)

Unit: "all employees of Grand & Toy Limited in the Municipality of Metropolitan Toronto at 125 Bermondsey Road and 33 Green Belt Drive, save and except supervisors, forepersons and persons above the rank of supervisor and forepersons, assistant supervisor in the shipping department, secretary to the warehouse manager, security guards and students employed during the school vacation period, office, clerical and sales staff and employees for whom any union holds bargaining rights on April 1, 1997" (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1

0035-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Apollo 8 Maintenance Services Limited (Respondent)

Unit: "all employees of Apollo 8 Maintenance Services Limited employed at the Scotia Plaza, 40 King Street West, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, office and clerical and sales staff" (57 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	57
Number of persons who cast ballots	55
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	55
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	19

0038-97-R: United Food and Commercial Workers International Union AFL, CIO, CLC (Applicant) v. Southern Fine Foods (Respondent)

Unit: “all employees of Southern Fine Foods Ltd. in the Regional Municipality of Hamilton-Wentworth, save and except Forepersons, persons above the rank of Foreperson, Quality Control staff, and office and clerical staff” (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	1

0043-97-R: Canadian Health Care Workers (C.H.C.W.) (Applicant) v. The Women's Centre (Grey & Bruce) Inc. (Respondent) v. London & District Service Workers' Union, Local 220 (Intervener)

Unit #1: “all employees of The Women's Centre (Grey & Bruce) Inc., in the City of Owen Sound, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	3

Unit #2: “all employees of The Women's Centre (Grey & Bruce) Inc., in the City of Owen Sound regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	3

0056-97-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Clover Catering Division of 660910 Ontario Ltd. (Respondent)

Unit: “all employees of Clover Catering Division of 660910 Ontario Ltd. at Clover Catering: Lincoln Place Nursing Home, regularly employed for not more than 24 hours per week at 420 Walner Road in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8

Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	0

0079-97-R: Labourers' International Union of North America Local 183 (Applicant) v. Empire Maintenance Industries Inc. (Respondent)

Unit: "all employees of Empire Maintenance Industries Inc. at Canada Square Complex, at 2180, 2190 and 2200 Yonge Street in the Municipality of Metropolitan Toronto, save and except non-working forepersons, persons above the rank of non-working forepersons and students employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	5

Applications for Certification Dismissed Subsequent to Vote

2049-96-R: United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. Titan Tool & Die Limited (Respondent) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local 195 (Intervener)

Unit: "all employees of the respondent, in the City of Windsor, save and except supervisors and those above the rank of supervisors" (111 employees in unit)

Number of names of persons on revised voters' list	112
Number of persons who cast ballots	108
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	101
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	37
Number of ballots marked in favour of intervener	62
Number of ballots marked in favour of no union	1
Number of ballots segregated and not counted	7

2902-96-R: Hospitality, Commercial & Service Employees Union of Canada (Applicant) v. The Chronicle Journal (Respondent)

Unit: "all employees of The Chronicle Journal in the City of Thunder Bay, Ontario who are employed as newspaper carriers and delivery persons, save and except bundle distribution person, foreman and persons employed above the rank of foreman" (104 employees in unit)

Number of names of persons on revised voters' list	659
Number of persons who cast ballots	274
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	117
Number of ballots marked against applicant	150
Number of ballots segregated and not counted	6

3477-96-R: Labourers' International Union of North America, Local 183 (Applicant) v. Brockstone Construction Ltd./Rockport Group/Eastville Holdings Ltd./City & State Development Incorporated (Respondents)

Unit: "all construction labourers in the employ of Brockstone Construction Ltd./Rockport Group/Eastville Holdings Ltd./City & State Development Incorporated in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Brockstone

Construction Ltd./Rockport Group/Eastville Holdings Ltd./City & State Development Incorporated in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

Number of names of persons on revised voters’ list	4
Number of persons who cast ballots	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

3889-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Contran Manufacturing (1982) Limited (Respondent)

Unit: “all employees of Contran Manufacturing (1982) Ltd., in the City of St. Thomas, save and except supervisors, persons above the rank of supervisor, office, clerical, engineering and sales staff” (62 employees in unit)

Number of names of persons on revised voters’ list	70
Number of persons who cast ballots	68
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	58
Number of segregated ballots cast by persons whose names appear on voter’s list	10
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	38
Number of ballots segregated and not counted	0

4021-96-R: International Brotherhood of Painters & Allied Trades, Local Union 1891 (Applicant) v. G and H Drywall Service (Respondent)

Unit: “all painters and painters’ apprentices in the employ of G and H Drywall Service in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters’ apprentices in the employ of G and H Drywall Service in all other sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelso, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

Number of names of persons on revised voters’ list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	3

4087-96-R: International Brotherhood of Painters & Allied Trades, Local Union 1891 (Applicant) v. Waco Drywall Services Ltd. (Respondent)

Unit: “all painters, painters’ apprentices and drywall tapers in the employ of Waco Drywall Services Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters, painters’ apprentices and drywall tapers in the employ of Waco Drywall Services Ltd. in all other sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand; the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the

Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	5

4103-96-R: International Brotherhood of Painters and Allied Trades, Local Union 1819 (Applicant) v. Sota Glazing Inc. (Respondent)

Unit: "all employees of Sota Glazing Inc., in the Region of Peel, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (18 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	14

4122-96-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. C & T Framing Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of C & T Framing Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of C & T Framing Inc. in all other sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	13

4214-96-R: Teamsters Local Union No. 879 (Applicant) v. Petstuff Canada Ltd. (Respondent)

Unit: "all employees of Petstuff Canada Ltd. in the Regional Municipality of Hamilton-Wentworth, save and except directors, persons above the rank of director and office staff" (32 employees in unit)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	3

4276-96-R: I.W.A. - Canada (Applicant) v. Coats Bell, A Division of Coats Canada Inc. (Respondent)

Unit: "all employees of Coats Bell in Arthur, Ontario, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff, part-time employees who work 24 hours or less per week, and students employed during the school vacation period" (105 employees in unit)

Number of names of persons on revised voters' list	103
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Number of persons who cast ballots	100
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	98
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	75
Number of ballots segregated and not counted	2

4357-96-R: United Steelworkers of America (Applicant) v. Nexus Components Ltd. (Respondent)

Unit: "all employees of Nexus Components Ltd. in the City of Barrie, save and except supervisors, persons above the rank of supervisor and office, clerical and sales staff" (20 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	4

4359-96-R: International Union of Operating Engineers, Local 796 (Applicant) v. Camdev Properties Inc. (Respondent) v. Independent Canadian Transit Union and its Local 6 (Intervener)

Unit: "all stationary engineers, skilled workers and their helpers in employ at the Place de Ville project, save and except the Chief Engineer, the Assistant Chief Engineer, the Building Systems Controls Technician, students hired for the summer vacation period, office and sales staff, electricians and electrician apprentices" (19 employees in unit)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	14

Applications for Certification Withdrawn

1946-96-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Admiral Drywall Ltd. (Respondent)

3721-96-R: Canadian Union of Public Employees (Applicant) v. The Toronto Hospital (Respondent)

4236-96-R: United Steelworkers of America (Applicant) v. Group 4 C.P.S. Limited (Respondent) v. Canadian Security Union (Intervener)

4319-96-R: Canadian Union of Public Employees (Applicant) v. The Township of Plummer Additional (Respondent) v. Labourers' International Union of North America, Local 1036 (Incumbent Union)

0063-97-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 880 (Applicant) v. Sterling Marine Fuels, A Division of McAsphalt Industries Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

0155-97-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. A & T Decorating (1988) Ltd. (Respondent)

0157-97-R: The Association of E.M.A's and Paramedic's of M.C.M.B. Ambulance Service (Applicant) v. M.C.M.B. Ambulance Service (Respondent)

0254-97-R: Labourers' International Union of North America, Local 837 (Applicant) v. Twin-Oaks Environmental Ltd. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0276-96-R: Sheet Metal Workers' International Association, Local 537 (Applicant) v. F. Pilgrim & Co. Ltd., Hamilton Central Mechanical Inc., Pilgrim Sheetmetal Ltd. (Respondents) (*Granted*)

0875-96-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Aluma Systems Canada Inc. and E & D Services Corp. (Respondents) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, United Brotherhood of Carpenters and Joiners of America, Local 785 and United Brotherhood of Carpenters and Joiners of America, Local 18 (Intervenors) (*Granted*)

1305-96-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Innovative Flooring Inc. and Tri-Can Contracting Incorporated (Respondents) v. Resilient Flooring Contractors Association of Ontario (Intervener) (*Endorsed Settlement*)

2011-96-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 938806 Ontario Inc. c.o.b. as Leduc Electric Ltd., 1120172 Ontario Inc. c.o.b. as Leduc Electric Limited, Georges Leduc, Peter Leduc (Respondents) (*Withdrawn*)

2728-96-R: Bricklayers' & Masons' Union No.1, Ontario of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Fahrmeier Masonry Ltd., 1138565 Ontario Inc., Layrite Masonry, Wilhelm Heinrich Fahrmeier (Respondents) (*Granted*)

2955-96-R: International Union of Bricklayers and Allied Craftworkers Local #2, Toronto/Barrie, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers (Applicant) v. ACDMC Group Incorporated and Springbank Masons Ltd. (Respondents) (*Granted*)

3182-96-R: United Food & Commercial Workers International Union AFL, - CIO, - CLC (Applicant) v. E & V Leasing (Respondent) (*Withdrawn*)

3423-96-R: Hotel, Restaurant and Hospitality Service Employees Union, Local 442 (Applicant) v. Canadian Niagara Hotels Inc., Music Legends Limited c.o.b. as The Hard Rock Cafe, Skyline Brock Hotel, Skyline Foxhead, The Village Inn, 1137706 Ontario Limited (changed to Maple Leaf Casinos Inc. on April 19, 1996), 1032514 Ontario Limited, Greenberg International Inc., 525230 Ontario Limited c.o.b. as Terrace Food Court (Respondents) (*Granted*)

3965-96-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Alstate Drywall Systems Ltd. and Parvi Drywall Systems Ltd. and Mavi Drywall Systems Ltd. (Respondents) (*Withdrawn*)

3992-96-R: The United Food and Commercial Workers' International Union, Local 175 & 633 (Applicant) v. Devonshire Stone Lodge Inc. and Meadowcroft Group and Stone Lodge Limited Partnership (Respondents) (*Withdrawn*)

4061-96-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Calorific Construction Limited, Bramkal Contractors Inc. (Respondents) (*Withdrawn*)

0041-97-R: Teamsters Local Union No. 879 (Applicant) v. Tri-City Ready Mix and Raith Ready-Mix, A Division of Essroc Canada Inc. (Respondents) v. Christian Labour Association of Canada (Intervener) (*Withdrawn*)

SALE OF A BUSINESS

0272-96-R: Children's Mental Health Services (Serving Children and Families in Hastings and Prince Edward Counties) (Applicant) v. Ontario Public Service Employees Union and its Local 444, Canadian Union of Public Employees and its Local 3314.3, Canadian Union of Public Employees and its Local 3214.2 (Respondents) (*Granted*)

0276-96-R: Sheet Metal Workers' International Association, Local 537 (Applicant) v. F. Pilgrim & Co. Ltd., Hamilton Central Mechanical Inc., Pilgrim Sheetmetal Ltd. (Respondents) (*Granted*)

0875-96-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Aluma Systems Canada Inc. and E & D Services Corp. (Respondents) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, United Brotherhood of Carpenters and Joiners of America, Local 785 and United Brotherhood of Carpenters and Joiners of America, Local 18 (Intervenors) (*Granted*)

0979-96-R: The Canadian Union of Public Employees - Local 3831 (Applicant) v. The Governing Council of the University of Toronto (Respondent) (*Dismissed*)

1305-96-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Innovative Flooring Inc. and Tri-Can Contracting Incorporated (Respondents) v. Resilient Flooring Contractors Association of Ontario (Intervener) (*Endorsed Settlement*)

2011-96-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 938806 Ontario Inc. c.o.b. as Leduc Electric Ltd., 1120172 Ontario Inc. c.o.b. as Leduc Electric Limited, Georges Leduc, Peter Leduc (Respondents) (*Withdrawn*)

2728-96-R: Bricklayers' & Masons' Union No.1, Ontario of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Fahrmeyer Masonry Ltd., 1138565 Ontario Inc., Layrite Masonry, Wilhelm Heinrich Fahrmeyer (Respondents) (*Granted*)

2955-96-R: International Union of Bricklayers and Allied Craftworkers Local #2, Toronto/Barrie, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers (Applicant) v. ACDMC Group Incorporated and Springbank Masons Ltd. (Respondents) (*Granted*)

3299-96-R: Health, Office and Professional Employees, A Division of Local 175 United Food and Commercial Workers Union (Applicant) v. Arbor Management Limited (Respondent) v. Arthur Andersen Inc. (Intervener) (*Granted*)

3965-96-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Alstate Drywall Systems Ltd. and Parvi Drywall Systems Ltd. and Mavi Drywall Systems Ltd. (Respondents) (*Withdrawn*)

3992-96-R: The United Food and Commercial Workers' International Union, Local 175 & 633 (Applicant) v. Devonshire Stone Lodge Inc. and Meadowcroft Group and Stone Lodge Limited Partnership (Respondents) (*Withdrawn*)

4061-96-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Calorific Construction Limited, Bramkal Contractors Inc. (Respondents) (*Withdrawn*)

0041-97-R: Teamsters Local Union No. 879 (Applicant) v. Tri-City Ready Mix and Raith Ready-Mix, A Division of Essroc Canada Inc. (Respondents) v. Christian Labour Association of Canada (Intervener) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

3244-95-R: United Steelworkers of America (Applicant) v. National Silicates Limited (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3278-96-R: The Employees of Almat Steel Limited (Applicant) v. United Steelworkers of America, Local Union No. 5483 (Respondent) v. Almat Metal Limited (Intervener)

Unit: "all employees of Almat Steel Limited in the City of Newmarket, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff" (16 employees in unit) (*Withdrawn*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	4

4053-96-R: James A. H. Lederman (Applicant) v. Teamsters Local Union No. 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. Raith Ready Mix, A Division of Essroc Canada Inc. (Intervener) v. Tri-City Ready Mix (Interested Party)

Unit: "all employees of Raith Ready-Mix, A Division of Essroc Canada Inc. at Kitchener, Ontario, save and except foreman and those above the rank of foreman, office and sales staff" (7 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked against respondent	7

4175-96-R: Peter Menzies (Applicant) v. Canadian Union of Public Employees (Respondent) v. Native Child and Family Services of Toronto (Intervener) (*Withdrawn*)

4189-96-R: David Singleton (Applicant) v. Graphic Communications International Union, Local 100-M (Respondent)

Unit: "The Company recognizes the Union as the exclusive bargaining agent for journeymen pressmen, apprentice pressmen, press assistants and apprentices employed under this Agreement" (1 employee in unit) (*Granted*)

Number of names of persons on revised voters' list	1
Number of persons who cast ballots	1
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1

4253-96-R: Sandra Onizaki and Michelle Campbell (Applicant) v. USWA Division Retail Wholesale Canada (Respondent) v. 9888492 Ontario Inc. (Intervener) (*Dismissed*)

0048-97-R: Paul Janmaat (Applicant) v. Retail, Wholesale Canada; Canadian Service Sector of the United Steelworkers of America, Local 461 (Respondent) v. The Hostess Frito-Lay Company (Intervener)

Unit: "all employees of The Hostess Frito-Lay Company at London Ontario, save and except supervisors, persons above the rank of supervisor, warehouse position, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (24 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	12

Number of ballots marked against respondent

11

0161-97-R: 1025963 Ontario Inc. (c.o.b.) as Union Taxi (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of the United Steelworkers Local 1688 Ontario Taxi Union (Respondent) (*Dismissed*)

0258-97-R: Johanne Guimond Soucy (Applicant) v. Industrielle and Woodwork Alliance Local 12995 (Respondent) (*Granted*)

REFERRAL FROM MINISTER (SECTION 109)

1949-96-M: Labourers' International Union of North America, Local 1059 (Applicant) v. The Cadillac Fairview Corporation Limited ("Cadillac Fairview") and Oakdale Cleaners & Maintenance Limited ("Oakdale Cleaners") (Respondents) (*Granted*)

2465-96-M: Shaw Baking Company Limited (Applicant) v. Bakery, Confectionery and Tobacco Workers' International Union, and its Local 284 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0032-97-U: Stelco Inc. (Hilton Works) (Applicant) v. United Steelworkers of America, Local 1005 and Jack (Jake) Lombardo and Donald Fraser (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0046-97-U: Steluk Building Corporation (Applicant) v. Labourers' International Union of North America, Local 183, George Vala, Quinto, Dorval Terceira, and Joao Alves (Respondent) (*Endorsed Settlement*)

0047-97-U: Mattamy (Deerfield) Limited (Applicant) v. Labourers' International Union of North America, Local 183, Luis Camara, and Joao Alves (Respondent) (*Endorsed Settlement*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0953-95-U: David J. Freeman (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 303 (Respondent) v. General Motors of Canada Limited (Intervener) (*Withdrawn*)

1345-95-U: Tricia Monsegue (Applicant) v. Ontario Public Service Employees Union and The Crown in Right of Ontario as represented by the Ministry of Agriculture, Food and Rural Affairs (Respondents) (*Dismissed*)

1407-95-U: Kam Sidhu (Applicant) v. Ontario Public Service Employees Union and The Crown in Right of Ontario as represented by the Ministry of Agriculture, Food and Rural Affairs, Management Board Secretariat (Respondents) (*Dismissed*)

3015-95-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 1138774 Ontario Inc. c.o.b. as Fort Erie Foodland (Respondent) (*Withdrawn*)

3734-95-U: Iona Klassen (Applicant) v. The Crown in Right of Ontario and Ontario Public Service Employees' Union (Respondents) (*Withdrawn*)

0201-96-U: Sheila Ladd (Applicant) v. International Union, United Plant Guard Workers of America, Local 1956 and Burns International Security Services Limited (Respondents) (*Dismissed*)

0479-96-U; 1987-96-U: Ontario Public Service Employees Union, Local 592 (Applicant) v. Metro Toronto Housing Authority (Respondent) (*Withdrawn*)

0805-96-U: Guy A. Foisy (Applicant) v. Local 707 C.A.W. (Respondent) (*Dismissed*)

0972-96-U: Ontario Public Service Employees Union (Applicant) v. London Health Sciences Centre (Respondent) (*Withdrawn*)

1391-96-U: United Food and Commercial Workers International Union AFL - CIO - CLC (Applicant) v. Doornekamp Brothers Trucking Limited (Respondent) (*Withdrawn*)

1616-96-U: Randy Brophy (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union (CAW-Canada) and its Local 1991 (Respondent) v. Alloy Wheels International (Canada) Ltd. (Intervener) (*Dismissed*)

1790-96-U: Dev Jebodh (Applicant) v. Ontario Public Service Employees Union (OPSEU) (Respondent) v. The Crown in Right of Ontario, as represented by Management Board of Cabinet (Intervener) (*Dismissed*)

2040-96-U: United Steelworkers of America (Applicant) v. Del's Pastry Ltd. (Respondent) (*Withdrawn*)

2133-96-U: Basil Knowle (Applicant) v. Property Management Service Organization (PMSO), Greenwin Property Management (GPM) and Labourers' International Union of North America, Local 183 (Respondents) (*Dismissed*)

2200-96-U: Barry Wymant (Applicant) v. CAW Local 385 (Respondent) v. Coca-Cola Bottling Ltd. (Intervener) (*Withdrawn*)

2420-96-U: Frank Porcaro (Applicant) v. International Union of Operating Engineers (Respondent) (*Withdrawn*)

2564-96-U: Jorge Wilches (Applicant) v. Canadian Union of Brewery and General Workers Wil and Canadian Union of Brewery and General Workers Local 325 (Respondent) v. Molson Ontario Breweries (Intervener) (*Dismissed*)

2660-96-U: Francis Kowalczyk (Applicant) v. Canadian Union of Public Employees, Local 1748 (Respondent) v. Golden Plough Lodge (Intervener) (*Withdrawn*)

2876-96-U: Sheila M. Bugala (Applicant) v. Halton Roman Catholic School Board and Canadian Union of Public Employees, Local 2888 (Respondents) (*Withdrawn*)

3081-96-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. L & L Tool Inc. (Respondent) (*Withdrawn*)

3107-96-U; 3110-96-U; 3332-96-U: Hospitality, Commercial & Service Employees Union of Canada (Applicant) v. The Chronicle Journal (Respondent) (*Withdrawn*)

3113-96-U: Martin J. Collins (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) (*Dismissed*)

3293-96-U: Fay Hewitt-Morris (Applicant) v. Communications, Energy and Paperworkers Union Local 304 (Respondent) v. Sunworthy Wallcoverings (Intervener) (*Dismissed*)

3422-96-U: Hotel, Restaurant and Hospitality Service Employees Union, Local 442 (Applicant) v. Canadian Niagara Hotels Inc. and Music Legends Limited c.o.b. Hard Rock Cafe (Respondents) (*Withdrawn*)

3450-96-U: Merike Madisso (Applicant) v. Canadian Union of Public Employees, Local 1750 (Respondent) (*Withdrawn*)

3499-96-U: Anna Madill (Applicant) v. Arthur Grant (OPSEU Local 350) (Respondent) (*Withdrawn*)

3570-96-U: United Food & Commercial Workers, Local Union 326W and Ernest G. Reed (Applicant) v. United Brewers Warehousing Workers' Provincial Board and Brewers Retail Inc. (Respondents) (*Withdrawn*)

3681-96-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Park'N Fly (Respondent) (*Withdrawn*)

3689-96-U: Marilyn Benjamin on behalf of 90 Ultra Mart Employees (Applicant) v. United Food and Commercial Workers International Union Locals 175 and 633 (Respondent) v. The Great Atlantic and Pacific Company of Canada, Limited (Intervener) (*Withdrawn*)

3747-96-U: Chris Wai Man Li (Applicant) v. Ontario Public Service Employees Union (OPSEU) (Respondent) v. Ministry of Finance (Intervener) (*Withdrawn*)

3763-96-U: United Steelworkers of America (Applicant) v. Almat Metal Limited (Respondent) (*Withdrawn*)

3786-96-U; 3787-96-U; 4041-96-U: Institute of Mental Health Research (Applicant) v. Ontario Public Service Employees Union (Respondent); Royal Ottawa Health Care Group (Applicant) v. Ontario Public Service Employees Union (Respondent); Ontario Public Service Employees Union (Applicant) v. Institute of Mental Health Research, Royal Ottawa Health Care Group (Respondents) (*Withdrawn*)

3832-96-U: Clara F. Araujo (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada) Local 4123 (Respondent) (*Withdrawn*)

3854-96-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 35 (Applicant) v. Siemens Electric Limited (Respondent) (*Dismissed*)

4088-96-U: Ronald Duplassie (Applicant) v. Domtar Incorporated, Domtar Forest Products, White River Saw Mill and Industrial Wood and Allied Workers of Canada, Local 2693 (Respondents) (*Withdrawn*)

4098-96-U: Canadian Union of Public Employees (Applicant) v. The Toronto Hospital (Respondent) (*Withdrawn*)

4120-96-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Corma Inc. (Respondent) (*Withdrawn*)

4151-96-U: Laundry & Linen Drivers and Industrial Workers, Teamsters, Local 847 (Applicant) v. Otema Store Interiors Ltd. (Respondent) (*Withdrawn*)

4153-96-U: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. The Old Mill Restaurant (Lark Hospitality Inc.) (Respondent) (*Withdrawn*)

4160-96-U: Frank Falletta (Applicant) v. Nabisco Ltd. (Respondent) (*Withdrawn*)

4322-96-U: Raffick Aliry (Applicant) v. United Steelworkers of America Local 9236 and Walbar Canada Inc., Plant 1 (Respondents) (*Withdrawn*)

4360-96-U: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Waco Drywall Services Limited (Respondent) (*Withdrawn*)

0029-97-U: Labourers' International Union of North America, Local 1089 (Applicant) v. Sanitary Maintenance Company Limited (Respondent) (*Endorsed Settlement*)

0089-97-U: Bill Hannon, Don Flynn, Ross Nafziger, Gary Collins, Nick Altmayor, Ron Williams, Blair Nowe, Betty Nowe, Blayne Nowe, Ken Drummond, Sandy Sim, Ron Moreau, and others (Applicant) v. Schneider's Employees' Association (Respondent) (*Dismissed*)

0177-97-U: Lisa Douglas and Patrick Lussier (Applicant) v. Hospitality & Service Trade Union, Local 261, Ottawa (Respondent) (*Dismissed*)

0194-97-U: Teamsters Local Union No. 879 (Applicant) v. Tri-City Ready Mix and Raith Ready-Mix, A Division of Essroc Canada Inc., and Christian Labour Association of Canada (Respondents) (*Withdrawn*)

0205-97-U: Oliver Vivian Rose (Applicant) v. Ontario Produce and Teamsters Union Local 419 (Respondents) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

0030-97-M: Labourers' International Union of North America, Local 1089 (Applicant) v. Sanitary Maintenance Company Limited (Respondent) (*Endorsed Settlement*)

APPLICATIONS FOR CONSENT TO PROSECUTE

2010-96-U: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 938806 Ontario Inc. c.o.b. as Leduc Electric Ltd., 1120172 Ontario Inc. c.o.b. as Leduc Electric Limited, Georges Leduc, Peter Leduc (Respondents) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

2813-95-M: Helen M. Northcott (Applicant) v. The Practical Nurses Federation of Ontario and Victorian Order of Nurses Metro Branch (Respondents) (*Granted*)

JURISDICTIONAL DISPUTES

2664-95-JD: Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 504 (Applicant) v. The State Group Limited and International Brotherhood of Boilermakers Iron Ship Builders, Blacksmiths, Forgers and Helpers', Local 128 and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 508 (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3854-95-M: OPSEU (Local 557) (Applicant) v. George Brown College of Applied Arts and Technology (Respondent) (*Withdrawn*)

0011-96-M: Notre Dame Hospital (Applicant) v. Ontario Nurses' Association (Respondent) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3488-95-OH: John Sellers, Mario Romagnuolo, Gerald Pelley and CAW Local 222 (Applicant) v. Robert Taylor, Don Sawyer and General Motors of Canada Limited (Respondents) (*Granted*)

0054-96-OH; 0260-96-OH: Janet Craig (Applicant) v. Ontario Hydro (Respondent) v. The Society of Ontario Hydro Professional and Administrative Employees (The Society) (Intervener); Leslie Smith (Applicant) v. Ontario Hydro (Respondent) v. The Society of Ontario Hydro Professional and Administrative Employees (The Society) (Intervener) (*Withdrawn*)

2663-96-OH: Mrs. Margaret E. Dobson (Applicant) v. New Apostolic Church, Administration Office (Respondent) (*Withdrawn*)

3421-96-OH: Sybil Mccullough, Tony Alves, CAW Local 222, CAW National Union (Applicants) v. Roger Lyons & General Motors of Canada Ltd. (Respondents) (*Withdrawn*)

3470-96-OH: Timothy Edward Vale (Applicant) v. Crystal Fountains (Respondent) (*Withdrawn*)

3610-96-OH: Robert Pursley (Applicant) v. Dominion Castings Ltd. (Respondent) (*Withdrawn*)

3824-96-OH: Mark Thomas Mitchell (Applicant) v. Procor Limited (Respondent) (*Withdrawn*)

3884-96-OH: John Birch (Applicant) v. Burlington Taxi Inc. (Respondent) (*Withdrawn*)

3998-96-OH: Catherine Samalea (Applicant) v. Toronto East General and Orthopaedic Hospital Inc. and Elsa Van Vliet (Respondents) (*Withdrawn*)

4130-96-OH; 4131-96-OH: David Bishop (Applicant) v. Naturally Yours Vegetarian Gourmet (Respondent); Raj Parshad (Applicant) v. Naturally Yours Vegetarian Gourmet (Respondent) (*Withdrawn*)

4134-96-OH: Jonathan Gowing (Applicant) v. Margaret Smith (Ontario Federation for Cerebral Palsy) (Respondent) (*Withdrawn*)

0098-97-OH: Teamsters 847 member Mike Carbe (Applicant) v. Total Services (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2957-94-G: Labourers' International Union of North America, Local 506 (Applicant) v. Toronto Dominion Bank (Respondent) (*Dismissed*)

1204-95-G; 1225-95-G: A Council of Trade Unions Acting on Behalf of Labourers International Union of North America, Local 183 and Teamsters Local Union 230 (Applicant) v. Warren Bitulithic Limited (Respondent); Teamsters Local Union 230 A Council of Trade Unions acting as representative and agent of Labourers International Union of North America, Local 183 and Teamsters Local Union 230 (Applicant) v. Gazzola Paving Limited (Respondent) (*Dismissed*)

3367-95-G: Teamsters Local Union No. 230 affiliated with the International Brotherhood of Teamsters (Applicant) v. Ontario Hydro (Respondent) (*Withdrawn*)

0291-96-G; 3735-96-G: Labourers' International Union of North America, Local 183 (Applicant) v. Stephen's Carpentry Ltd. (Respondent) (*Withdrawn*)

0415-96-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Banforming 1991 Inc. (Respondent) (*Granted*)

0604-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Marli Mechanical Ltd. (Respondent) (*Granted*)

0860-96-G; 0861-96-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Industrial Machinery Movers (Respondent) (*Withdrawn*)

1874-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Applicant) v. Resource Industrial Group Inc. (Respondent) (*Withdrawn*)

2070-96-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Epron Construction Limited (Respondent) (*Granted*)

2548-96-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Innovative Flooring Inc. and Tri-Can Contracting Incorporated (Respondents) v. Resilient Flooring Contractors Association of Ontario (Intervener) (*Endorsed Settlement*)

2729-96-G: Bricklayers' & Masons' Union No.1, Ontario of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Fahrmeyer Masonry Ltd., 1138565 Ontario Inc., Layrite Masonry, Wilhelm Heinrich Fahrmeyer (Respondents) (*Granted*)

2850-96-G; 4192-96-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ambler Courtney Inc. (Respondent) (*Endorsed Settlement*)

2907-96-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. The State Group Inc. (Respondent) (*Withdrawn*)

3056-96-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Nicholls-Radtke Ltd. (Respondent) v. United Brotherhood of Carpenters and Joiners of America Local 446 (Intervener) (*Withdrawn*)

3104-96-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Today Tile & Carpet Ltd. (Respondent) (*Granted*)

3358-96-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Schindler Elevator Corp. (Respondent) (*Withdrawn*)

3402-96-G: Labourers' International Union of North America, Local 506 (Applicant) v. Eagle Stone Limited (Respondent) (*Granted*)

3433-96-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Plaza Electric II Ltd. (Respondent) (*Endorsed Settlement*)

3449-96-G: International Brotherhood of Painters and Allied Trades, Local Union 1795 (Applicant) v. St. Catharines Glass & Mirror (Niagara) Ltd. (Respondent) (*Granted*)

3547-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Francis H.V.A.C. Services Ltd. (Respondent) (*Endorsed Settlement*)

3604-96-G: Sheet Metal Workers' International Association, Local 562 (Applicant) v. CJA's Construction Ltd. (Respondent) (*Granted*)

3652-96-G: United Brotherhood of Carpenters and Joiners of America, Local 1256 (Applicant) v. J.A. MacDonald London Limited (Respondent) (*Endorsed Settlement*)

3743-96-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. State Electric (Respondent) (*Withdrawn*)

3802-96-G: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. Walter & SCI Construction (Canada) Ltd. (Respondent) (*Withdrawn*)

3966-96-G; 3967-96-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Parvi Drywall Systems Ltd. and Mavi Drywall Systems Ltd. and Alstate Drywall Systems Ltd. (Respondents) (*Granted*)

4025-96-G: International Union of Bricklayers and Allied Craftworkers, Local #2, Ontario (Applicant) v. Cruz Construction Group Inc. (Respondent) (*Granted*)

4036-96-G: International Union of Operating Engineers, Local 793 (Applicant) v. 1130887 Ontario Inc. o/a Latta Crane Services (Respondent) (*Endorsed Settlement*)

4060-96-G: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Calorific Construction Limited and Bramkal Contractors Inc. (Respondents) (*Withdrawn*)

4199-96-G: The United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Bellai Brothers Ltd. (Respondent) (*Endorsed Settlement*)

4207-96-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Semple-Gooder Roofing Limited (Respondent) (*Withdrawn*)

- 4209-96-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Don Valley Electric (919937 Ontario Limited) (Respondent) (*Withdrawn*)
- 4247-96-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Buttcon Limited (Respondent) (*Withdrawn*)
- 4248-96-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Construction Sajo Inc. (Respondent) (*Granted*)
- 4249-96-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Unique General Contracting (Respondent) (*Granted*)
- 4256-96-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The Corporation of the City of Toronto (Respondent) (*Withdrawn*)
- 4301-96-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Dibco Underground Ltd. (Respondent) (*Granted*)
- 4302-96-G:** International Brotherhood of Painters and Allied Trades, Local Union 1819 (Applicant) v. Can-Am Glass & Mirror Ltd. (Respondent) (*Granted*)
- 4311-96-G:** International Brotherhood of Painters & Allied Trades, Glaziers Local 1819 (Applicant) v. Service Glass & Mirror Ltd. (Respondent) (*Granted*)
- 4334-96-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. S. Breda Plumbing Limited (Respondent) (*Withdrawn*)
- 4345-96-G:** International Brotherhood of Electrical Workers, Locals 804 and 303 (Applicant) v. Sini Electric Ltd. (Respondent) (*Withdrawn*)
- 4349-96-G:** International Brotherhood of Painters & Allied Trades, Glaziers Local 1819 (Applicant) v. Top Glass & Mirror Inc. (Respondent) (*Granted*)
- 4350-96-G:** International Brotherhood of Painters & Allied Trades, Glaziers Local 1819 (Applicant) v. Tech-Stall Glass (Respondent) (*Granted*)
- 4352-96-G:** International Brotherhood of Painters & Allied Trades, Glaziers Local 1819 (Applicant) v. Ferguson-Neudorf Glass Inc. (Respondent) (*Granted*)
- 4353-96-G:** International Brotherhood of Painters & Allied Trades, Glaziers Local 1819 (Applicant) v. Hardie Glass & Aluminum Inc. (Respondent) (*Granted*)
- 4355-96-G:** International Brotherhood of Painters and Allied Trades, Glaziers Local 1891 (Applicant) v. Zerofibre Systems Inc. (Respondent) (*Withdrawn*)
- 4356-96-G:** International Brotherhood of Painters and Allied Trades, District Council 46 (Applicant) v. Associated Painting Limited (Respondent) (*Granted*)
- 4361-96-G:** International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Aspen Drywall Inc. (Respondent) (*Withdrawn*)
- 4364-96-G:** International Brotherhood of Painters and Allied Trades, District Council 46 (Applicant) v. Marchesa Contracting Ltd. (Respondent) (*Granted*)
- 0006-97-G:** International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Ekko Drywall Ltd. (Respondent) (*Granted*)

0008-97-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Canadian Tech Air Systems Inc. (Respondent) (*Granted*)

0018-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Can Hoist Crane & Transportation Rental Inc. (Respondent) (*Granted*)

0019-97-G: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. Walter & SCI Construction (Canada) Inc. (Respondent) (*Withdrawn*)

0042-97-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. All Trades Estimating Limited o/a Landmarc Construction (Respondent) (*Granted*)

0053-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Canadian Highways International Constructors (Respondent) (*Withdrawn*)

0077-97-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. (Respondent) (*Withdrawn*)

0088-97-G: Sheet Metal Workers' International Association Local 235 (Applicant) v. Riverside Aluminum & Building Ltd. (Respondent) (*Withdrawn*)

0107-97-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Acura Forming Ltd. (Respondent) (*Withdrawn*)

0169-97-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. (Respondent) (*Withdrawn*)

0180-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Batoni Construction Inc. (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1455-94-U: Samir Melhem, Mike Huzera, Dusan Egl, Ram Seenanan, Robb Herman, Behnam Ashrafhosseine, and Ali Jomma (Applicants) v. Retail Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Ontario Taxi Union), Blue Line Taxi Co. Limited (Respondents) (*Denied*)

3511-94-U; 3562-94-U; 3563-94-U: Jeff Metcalf (Applicant) v. Ontario Public Service Employees Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet (Respondents); Glenn Bearss (Applicant) v. Ontario Public Service Employees Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet (Respondents); Mike Robinson (Applicant) v. Ontario Public Service Employees Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet (Respondents) (*Dismissed*)

0831-95-M: Mr. Robert Martin (Applicant) v. Canadian Union of Public Employees Local 3014 (Respondent) (*Denied*)

2183-95-G: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 598 (Applicant) v. Pro-Tech Building Restoration (Respondent) (*Dismissed*)

1185-96-G: Labourers' International Union of North America, Local 1059 (Applicant) v. 715241 Ontario Limited c.o.b. as Hyde Park Concrete Co. and Marie Miszczak (Respondents) (*Denied*)

1526-96-U: Janet Watts and all affected Members of U.F.C.W. Local 175 at Community Lifecare (Applicant) v. Kathie Chrysler, United Food and Commercial Workers International Union, Local 175 (Respondent) v. Community Lifecare Inc. (Intervener) (*Dismissed*)

1920-96-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Bassi Developments Corp. (Respondent) (*Dismissed*)

1921-96-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Bassi Developments Corp., Bassi Construction & Masonry Ltd., and Bassi Construction Limited (Respondent) (*Dismissed*)

2083-96-U: Rodrigo Vergara (Applicant) v. CAW-Canada, Local 385 (Respondent) (*Denied*)

2412-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Vilo Systems Ltd. (Respondent) (*Dismissed*)

2637-96-U: Michael Beattie (Applicant) v. International Association of Machinists and Aerospace Workers, Local Lodge 1703 (Respondent) v. Dana Canada Inc. (Intervener) (*Dismissed*)

3386-96-U: Johanne Montpetit (Applicant) v. Bakery, Confectionery and Tobacco Workers International Union, Local 181 (Respondent) (*Dismissed*)

3707-96-OH: Melissa Steidman (Applicant) v. Paragon Protection Ltd. (Respondent) (*Dismissed*)

CASE LISTINGS MAY 1997

	PAGE
1. Applications for Certification	143
2. Applications for First Contract Arbitration	157
3. Applications for Declaration of Related Employer	157
4. Sale of a Business	158
5. Union Successor Rights	158
6. Section 64.2 - Successor Rights/Contract Services	159
7. Applications for Declaration Terminating Bargaining Rights	159
8. Applications for Direction Respecting Unlawful Lockout	161
9. Complaints of Unfair Labour Practice	161
10. Applications for Interim Order	165
11. Applications for Consent to Prosecute	165
12. Applications for Religious Exemption	165
13. Applications for Consent to Early Termination of Collective Agreement	165
14. Trusteeship	165
15. Jurisdictional Disputes	166
16. Applications for Determination of Employee Status	166
17. Complaints under the Occupational Health and Safety Act	166
18. Colleges Collective Bargaining Act	167
19. Construction Industry Grievances	167
20. Referral from Minister (Sec. 3(2)) HLDAA	169
21. Applications for Reconsideration of Board's Decision	170

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1997

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Under Sec. 11 of the Act

3264-96-R: United Food and Commercial Workers International Union (Applicant) v. Hercules Molded Products Inc. (Respondent)

Unit: "all employees of Hercules Molded Products Inc. in the Town of Kingsville, save and except persons above the rank of foreman, office, clerical and temporary employees" (13 employees in unit)

4010-96-R: Labourers' International Union of North America, Local 183 (Applicant) v. Kimble Construction Ltd. (Respondent)

Unit: "all construction Labourers in the employ of Kimble Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all labourers in the employ of Kimble Construction Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquering and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Bargaining Agents Certified Subsequent to Vote

2410-96-R: The People's Union (Applicant) v. Commonwealth Hospitality Ltd. (Ramada Inn Windsor) (Respondent) v. Teamsters Local 847, Laundry and Linen Drivers and Industrial Workers (Intervener)

Unit: "all employees of Commonwealth Hospitality Limited c.o.b. as the Ramada Inn, Windsor at its Ramada Inn, Windsor in the City of Windsor, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisors, office and sales staff and all employees of Commonwealth Hospitality Limited c.o.b. as Ramada Inn, Windsor, at its Ramada Inn, Windsor in the City of Windsor, save and except supervisors, persons above the rank of supervisors, office and sales staff, and persons regularly employed for not more than 24 hours per week" (61 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	61
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	52
Number of ballots marked in favour of intervener	8
Number of ballots segregated and not counted	0

2905-96-R: Labourers International Union of North America, Local 506 (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: "all construction labourers and employees engaged in cement finishing, waterproofing and restoration work in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and employees engaged in cement finishing, waterproofing and restoration work in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquering and Trafalgar, and the Towns of Ajax and Pickering in the Regional

Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (20 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters’ list	15
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	13
Number of ballots marked in favour of applicant	13

2906-96-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: “all journeymen and apprentice insulators and asbestos workers in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice insulators and asbestos workers in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters’ list	13
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	12
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	11

2932-96-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: “all journeymen electricians and electricians’ apprentices in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen electricians and electricians’ apprentices in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (41 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters’ list	100
Number of persons who cast ballots	83
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	83
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	81
Number of ballots marked against applicant	1

2946-96-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: “all boilermakers and boilermakers’ apprentices in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all boilermakers and boilermakers’ apprentices in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional

Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	0

2965-96-R: International Brotherhood of Painters and Allied Trades (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: "all journeymen and apprentice glaziers and metal mechanics in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice glaziers and metal mechanics in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0

2966-96-R: International Brotherhood of Painters and Allied Trades (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: "all painters and painters' apprentices in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	1

3845-96-R: United Steelworkers of America (Applicant) v. Carecor Health Services Ltd. (Respondent)

Unit: "all employees of Carecor Health Services Ltd. at York-Finch General Hospital in the Municipality of Metropolitan Toronto, save and except Patrol Supervisor, persons above the rank of Patrol Supervisor, and Facility Supervisor" (10 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7

Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

3947-96-R: Hotel, Restaurant and Hospitality Service Employees Union, Local 442 (Applicant) v. Prince of Wales Hotel (Niagara-on-the-Lake) (Respondent)

Unit: "all employees of the Prince of Wales Hotel (Niagara-on-the-Lake) employed at 6 Picton Street, Niagara-on-the-Lake, Ontario, save and except supervisors, persons above the rank of supervisor, sales staff, office and clerical staff and students enrolled in a college hotel management course" (110 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	185
Number of persons who cast ballots	149
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	133
Number of segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	82
Number of ballots marked against applicant	51
Number of ballots segregated and not counted	16

4274-96-R: United Steelworkers of America (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. located at 750 Lawrence West in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (23 employees in unit)

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	3

4320-96-R: IBEW Construction Council of Ontario (Applicant) v. Lancor Electric (1996) Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Lancor Electric (1996) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Lancor Electric (1996) Ltd. in all sectors of the construction industry in within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	3

4346-96-R: Canadian Union of Public Employees (Applicant) v. University of Ottawa (Respondent)

Unit: "all employees of the University of Ottawa, in the Regional Municipality of Ottawa-Carleton employed as Teaching Assistants, Tutors, Demonstrators, Markers, Research Assistants, Proctors and Lab Monitors, save and

except any person for whom a trade union held bargaining rights on the date of the application" (1250 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	1324
Number of persons who cast ballots	379
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	302
Number of ballots marked against applicant	44
Number of ballots segregated and not counted	30

0057-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. LOEB Inc. (Respondent)

Unit: "all employees of LOEB Inc. in the City of Brantford, save and except Assistant Store Directors, persons above the rank of Assistant Store Directors, Meat Manager, Grocery Manager, Produce Manager, Deli Manager, Service Manager, Bakery Manager and Bookkeeper" (84 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	87
Number of persons who cast ballots	70
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	68
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	57
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	2

0103-97-R: Christian Labour Association of Canada (Applicant) v. Scepter Corporation (Respondent)

Unit: "all employees of Scepter Corporation at 170 Midwest Road in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (130 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	159
Number of persons who cast ballots	160
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	160
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	131
Number of ballots marked against applicant	28

0122-97-R: Ontario Public Service Employees Union (Applicant) v. l'Hôpital Général d'Ottawa/Ottawa General Hospital (Respondent)

Unit: "all paramedical and technical employees of l'Hôpital Général d'Ottawa/Ottawa General Hospital in the Regional Municipality of Ottawa-Carleton, save and except supervisors, those above the rank of supervisor, office, clerical, administrative and information services employees, laboratory scientists, home dialysis helpers and persons for whom any trade union held bargaining rights as of April 10, 1997; tout le personnel paramédical et technique de l'Hôpital Général d'Ottawa/Ottawa General Hospital, situé dans la municipalité régionale d'Ottawa-Carleton, à l'exception des superviseurs et des personnes occupant hiérarchiquement un poste supérieur, des employés fournissant des services de bureau, d'administration et d'information, des scientifiques travaillant dans les laboratoires, des auxiliaires fournissant des services de dialyse à domicile et des personnes pour lesquelles un syndicat détenait un droit de négocier en date du 10 avril 1997" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	280
Number of persons who cast ballots	191

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	181
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	157
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	10

0147-97-R: Ontario Nurses' Association (Applicant) v. The Victorian Order of Nurses Peterborough, Victoria & Haliburton Branch (Respondent) v. Practical Nurses Federation of Ontario (Intervener)

Unit: "all registered and graduate nurses employed in a nursing capacity by The Victorian Order of Nurses Peterborough, Victoria & Haliburton Branch in the Counties of Peterborough, Victoria and Haliburton, save and except Nurse Managers, persons above the rank of Nurse Manager and persons for whom any trade union held bargaining rights as of April 10, 1997" (70 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	93
Number of persons who cast ballots	50
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	50
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	17

0159-97-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. DeBruyn Pro-Painters (Respondent)

Unit: "all painters and painters' apprentices in the employ of DeBruyn Pro-Painters in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of DeBruyn Pro-Painters in all sectors of the construction industry in the Counties of Essex and Kent; and the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	2

0175-97-R: Brewery, General and Professional Workers' Union (Applicant) v. Sunnybrook Health Science Centre (Respondent)

Unit: "all security officers employed by Sunnybrook Health Science Centre, save and except persons above that rank (i.e. supervisors and persons above the rank of supervisor), those persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods and temporary employees" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	13
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	2

0178-97-R: United Food and Commercial Workers International Union (Applicant) v. The Student Union of Confederation College Inc. c.o.b. as Sharky's Pub (Respondent)

Unit: "all employees of The Student Union of Confederation College Inc. employed at Sharky's Pub in the City of Thunder Bay, save and except Pub Manager and persons above the rank of Pub Manager" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	4

0185-97-R: Christian Labour Association of Canada (Applicant) v. Ontario Metal Industries Ltd. o/a Drago Mechanical Contracting (Respondent)

Unit: "all plumbers, apprentice plumbers, sheet metal workers, apprentice sheet metal workers, and labourers in the employ of Ontario Metal Industries Ltd. o/a Drago Mechanical Contracting in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (21 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	1

0193-97-R: Ontario Nurses' Association (Applicant) v. St. Mary's General Hospital (Respondent)

Unit: "all Placement Care Coordinators employed by St. Mary's General Hospital in the Region of Waterloo, save and except Directors, and persons above the rank of Director" (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	5

0200-97-R: Canadian Union of Public Employees (Applicant) v. Barrie Manor Retirement Home (Respondent)

Unit: "all employees of Barrie Manor Retirement Home, in the City of Barrie, save and except Supervisors, persons above the rank of Supervisor and Confidential Secretary to the Administrator" (29 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	5

0204-97-R: International Union of Operating Engineers, Local 796 (Applicant) v. Service de santé des Soeurs de la Charité d'Ottawa/Sisters of Charity Ottawa Health Service (Respondent) v. Independent Canadian Transit Union and its Local 6 (Intervener)

Unit: "all stationary engineers, helpers, maintenance and other employees in the employ of the Power Plants of the Service de santé des Soeurs de la Charité d'Ottawa/Sisters of Charity Ottawa Health Service in Ottawa, save and except the Chief Engineers, office and clerical staff and persons covered by subsisting collective agreements between the Sisters of Charity of Ottawa Hospital and the Independent Canadian Transit Union, the Ontario Public Service Employees Union, the Ontario Nurses Association and the Association of Allied Health Professionals: Ontario" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of applicant	11

0220-97-R: Service Employees Union, Local 183 (Applicant) v. Central Park Lodges Holding Inc. (Respondent)

Unit: "all office and clerical employees of Central Park Lodges Holding Inc. at 2370 Carling Avenue and 2374 Carling Avenue in the City of Ottawa, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of April 17, 1997" (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	3

0256-97-R: Brewery, General and Professional Workers' Union (Applicant) v. Centenary Hospital Association (Respondent) v. United Plant Guard orders of America, Local 1962 (Incumbent Union)

Unit: "all employees of the Centenary Hospital Association employed as security guards employed by Centenary Hospital Association in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and students employed during the school vacation period" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of applicant	12
Number of ballots marked in favour of intervener	1

0299-97-R: Canadian Union of Public Employees (Applicant) v. l'Hôpital général d'Ottawa/Ottawa General Hospital (Respondent)

Unit: "all office and clerical employees of l'Hôpital général d'Ottawa/Ottawa General Hospital, in the City of Ottawa, save and except Supervisors, persons above the rank of Supervisor, Human Resources and Occupational Health Services Employees, Executive Secretaries (Sec. IV), Base Hospital Program Employees, Psychogeriatric Program Employees, Child Psychiatry Program Employees, Physicians' Secretaries, G.P.T.'s, Management Information Systems Employees, Research Institute Employees, OGH Foundation Employees, Nursing Scheduling Coordinators, Homedialysis Helpers, Friends of the O.G.H. Employees (Volunteers), Patient Representatives, Security Guards and persons for whom any trade union held bargaining rights as of April 23, 1997" (429 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	431
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Number of persons who cast ballots	289
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	286
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	232
Number of ballots marked against applicant	53
Number of ballots segregated and not counted	3

0300-97-R: Christian Labour Association of Canada (Applicant) v. Delta Chi Beta Early Childhood Centre (Windsor) Inc. (Respondent)

Unit: "all employees of Delta Chi Beta Early Childhood Centre (Windsor) Inc. at 1385 Ouellette Ave. in the City of Windsor, save and except manager, administrative assistant and persons above the rank of administrative assistant" (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of ballots marked in favour of applicant	14

0309-97-R: United Food and Commercial Workers International Union (Applicant) v. Coca-Cola Bottling Ltd. (Respondent)

Unit: "all employees of Coca-Cola Bottling Ltd. employed in distribution/warehousing/equipment service in the Town of Cobourg, save and except zone supervisors, sales supervisors and plant supervisors, persons above the rank of zone supervisor, sales supervisor and plant supervisor, office and clerical staff, summer students and persons regularly employed for not more than twenty-four hours per week" (23 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	10

0331-97-R: Service Employees International Union, AFL-CIO, CLC (Applicant) v. Arbor Memorial Services Inc., c.o.b. as Highland Memory Gardens and Resthaven Memorial Gardens (Respondent)

Unit: "all employees employed by Highland Memory Gardens and Resthaven Memorial Garden, save and except assistant Property Manager, persons above the rank of assistant Property Manager, persons regularly employed for not more than 24 hours per week, office and sales staff, and persons employed on a seasonal basis" (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	2

0332-97-R: Communication, Energy & Paperworkers' Union of Canada, Local 1104 - Association of Toronto Secondary School Secretaries (Applicant) v. Board of Education for the City of Toronto (Respondent)

Unit: “all office and clerical occasional employees employed by the Board of Education for the City of Toronto in a secondary school, save and except students, supervisors, and those above the rank of supervisor” (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	0

0335-97-R: International Brotherhood of Electrical Workers Construction Council of Ontario (Applicant) v. 1104644 Ontario Ltd. c.o.b. as Cowie Electrical Services (Respondent)

Unit: “all electricians and electricians' apprentices in the employ of 1104644 Ontario Ltd. c.o.b. as Cowie Electrical Services in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of 1104644 Ontario Ltd. c.o.b. as Cowie Electrical Services in all sectors of the construction industry in the Regional Municipality of Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non- working foremen and persons above the rank of non-working foreman” (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

0355-97-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Burton Bros. Sheet Metal (Toronto) Ltd. (Respondent)

Unit: “all carpenters and carpenters' apprentices in the employ of Burton Bros (Sheet Metal (Toronto) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Burton Bros Sheet Metal (Toronto) Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non- working foremen and persons above the rank of non-working foreman” (8 employees in unit)

Number of persons who cast ballots	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of ballots segregated and not counted	5

0377-97-R: Graphic Communications International Union, Local 500M (Applicant) v. Arthurs-Jones Lithographing Limited (Respondent)

Unit: “all employees of Arthurs-Jones Lithographing Limited in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and sales staff and persons for whom the applicant held bargaining rights as of April 30th, 1997” (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	5

Number of ballots segregated and not counted

1

0401-97-R: Canadian Union of Public Employees (Applicant) v. University of Western Ontario (Respondent)

Unit: "all employees of the University of Western Ontario in the physical plant department and Thompson Recreational and Athletic Building engaged in the maintenance and service of buildings and grounds, save and except forepersons, those above the rank of foreperson, office staff, operating engineers, security guards, students employed during the school or university vacation period, and employees in bargaining units for which any trade union held bargaining rights as of May 2, 1997" (51 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	63
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	5

0405-97-R: International Association of Machinists and Aerospace Workers (Applicant) v. Oshawa Community Credit Union (Respondent)

Unit: "all employees of Oshawa Community Credit Union Limited in the City of Oshawa, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	3

0421-97-R: Service Employees International Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The Clarke Institute of Psychiatry (Respondent)

Unit: "all security guards employed at the Clarke Institute of Psychiatry in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and employees in bargaining units for which any trade union held bargaining rights as of May 5, 1997" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0

Applications for Certification Dismissed Without Vote

0617-97-R: Local 636 of the International Brotherhood of Electrical Workers (Applicant) v. Brantford Hydro Electric Commission (Respondent)

Applications for Certification Dismissed Subsequent to Vote

3228-96-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 853 (Applicant) v. Robertson Pyrotechem Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all sprinkler fitters and sprinkler fitters' apprentices in the employ Robertson Fire Equipment Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all sprinkler fitters and sprinkler fitters' apprentices in the employ of Robertson Fire Equipment Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

4123-96-R: Masonry Council of Unions Toronto and Vicinity (Applicant) v. Fernbrook Homes Ltd. and/or Oxville Homes Limited (Respondent)

Unit: "all construction labourers, journeymen and apprentice bricklayers, and journeymen and apprentice carpenters in the employ of Fernbrook Homes Ltd. and/or Oxville Homes Limited in all sectors of the construction industry, in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, and in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

4201-96-R: Hotel, Restaurant and Hospitality Service Employees Union, Local 442 (Applicant) v. Hampton Inn (Respondent)

Unit: "all employees of the Hampton Inn at 5591 Victoria Avenue in the City of Niagara Falls, save and except Supervisors, and persons above the rank of Supervisor." (44 employees in unit)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	5

0153-97-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Sentinel Plumbing Inc. (Respondent)

Unit: "all plumbers and plumbers' apprentices in the employ of Sentinel Plumbing Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers and plumbers' apprentices in the employ of Sentinel Plumbing Inc. in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar,

and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	8

0257-97-R: Industrial and Commercial Workers' Union (Unite) (Applicant) v. Lightolier/CFI Division of Canlyte Inc. (Respondent)

Unit: "all employees of Lightolier/CFI Division of Canlyte Inc. in the City of Cornwall, save and except supervisors, and persons above the rank of supervisor and clerical staff and salespersons and students and temporary workers" (83 employees in unit)

Number of names of persons on revised voters' list	85
Number of persons who cast ballots	85
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	81
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	38
Number of ballots marked against applicant	43
Number of ballots segregated and not counted	4

0269-97-R: United Food and Commercial Workers International Union, Local 1000A (Applicant) v. Mother Jackson's Open Kitchens, A Division of Consolidated Food Brands Inc. (Respondent)

Unit: "all employees of Mother Jackson's Open Kitchens in the Township of Scugog in the Region of Durham, save and except supervisors, persons above the rank of supervisor, office and sales staff" (150 employees in unit)

Number of names of persons on revised voters' list	161
Number of persons who cast ballots	144
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	144
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	58
Number of ballots marked against applicant	86
Number of ballots segregated and not counted	0

0282-97-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Northam Development Corporation and/or Northam Construction Corp. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Northam Development Corporation and/or Northam Construction Corp. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of Northam Development Corporation and/or Northam Construction Corp. in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0297-97-R: International Brotherhood of Electrical Workers, Local Union 1739 (Applicant) v. Orser Electric (1995) Limited (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Orser Electric (1995) Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of Orser Electric (1995) Limited in all other sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

0348-97-R: International Association of Machinists and Aerospace Workers (Applicant) v. Span Manufacturing Limited (Respondent)

Unit: "all employees of Span Manufacturing Limited in the City of Markham, save and except Supervisors, persons above the rank of Supervisor, office and sales staff" (70 employees in unit)

Number of names of persons on revised voters' list	69
Number of persons who cast ballots	67
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	67
Number of spoiled ballots	6
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	34

0350-97-R: Christian Labour Association of Canada (Applicant) v. Cobi Foods Inc. (Respondent) v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 141 (Intervener)

Unit: "all employees of Cobi Foods Inc. at its frozen food plant in Ingersoll (Oxford County), save and except foremen, foreladies, persons above the rank of foreman and forelady, office, technical and sales staff, seasonal employees employed between June 1 and December 15, and employees who work regularly for not more than 16 hours a week" (64 employees in unit)

Number of names of persons on revised voters' list	64
Number of persons who cast ballots	61
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	61
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	12
Number of ballots marked in favour of intervener	48

Applications for Certification Withdrawn

0071-95-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 257 (Applicant) v. Cineplex Odeon Corporation (Respondent)

2958-95-R: Bakery, Confectionery and Tobacco Workers' International Union, Local 264 (Applicant) v. Sir Bagel Company Ltd. (Respondent)

4316-96-R: United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. Cascade Precision Machining & Micro Precision Die Casting Div. of Amcan Casting Ltd. (Respondent)

0246-97-R: United Steelworkers of America (Applicant) v. Canadian Liquid Air Ltd. (Respondent)

0675-97-R: United Steelworkers of America (Applicant) v. Society of St. Vincent De Paul (Respondent)

FIRST AGREEMENT - DIRECTION

4171-96-FC: Service Employees International Union, Local 204 (Applicant) v. Signature Building Maintenance Systems Limited (Respondent) (*Granted*)

0360-97-FC: The Public Service Alliance of Canada (Applicant) v. The University of Western Ontario (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2777-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Vankesteren Electrical Contractors Limited and/or Vankesteren Electric Inc. and/or, Deltro Electric Ltd. (Respondents) (*Withdrawn*)

0037-96-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Toronto Dominion Bank, Pen Equity Management Limited, Westeinde Flemming Development Limited, Westeinde Construction Limited, Penex Kanata Limited (Respondents) (*Withdrawn*)

1030-96-R: Canadian Union of Public Employees Local 3874 (Applicant) v. Queensway General Hospital, Extendicare Health Services Inc. (Respondents) (*Withdrawn*)

1485-96-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Betteridge Constructions Inc. Betteridge Construction (Timmins) Ltd. Betteridge Smith Construction Co. Ltd. (Respondent) (*Granted*)

2262-96-R: Teamsters Local Union No. 419 (Applicant) v. SWO Distribution Centres Limited c.o.b. Surelink, Tibbett & Britten Group Canada Inc., The Oshawa Group Limited and Ontario Produce Company (Respondents) (*Withdrawn*)

2989-96-R: Jean-Guy Sabourin, Pierre Courville, Serge Newton, Denis Brazeau, Jean Marie Turpin, Roch Lemay, Pat O'Neil, Damien Labelle, Denis Lacourse, Denis Chretien, Denis Girouard, Mario Morissette, Michel Hotte, Steve Comtois, Robert Laberge and Brian Banks (Applicant) v. New Mandor Food Storage Inc., 1172305 Ontario Inc., West Pack Limited, Capital Beef Corporation and (Respondents) v. Teamsters Local Union 91 (Intervener) (*Withdrawn*)

3621-96-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Galmar Electrical Contracting Inc., Sanimar Electric Limited, Noranda Electrical Contractors Limited and Marmet Electrical Contracting Inc. (Respondents) (*Granted*)

3946-96-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Palladium Catering Services Corporation and Rock the Byward Market Corp. (Respondents) (*Withdrawn*)

4193-96-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. L. Pupolin Plumbing & Heating Limited, Associated Mechanical Trades Incorporated, Luciano Pupolin, Ed Pupolin (Respondents) (*Withdrawn*)

0037-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Canadian Concrete Forming Limited and, Canada-Wide Waterproofing Supplies and Installation Ltd. (Respondents) (*Granted*)

0349-97-R: International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. 418058 Ontario Limited c.o.b. as TJ Steel, Deranne Steel Fabricators Ltd., Joe Francesconi, Silvano Francesconi (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2777-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Vankesteren Electrical Contractors Limited and/or Vankesteren Electric Inc. and/or, Deltro Electric Ltd. (Respondents) (*Withdrawn*)

1877-95-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Downsview Plumbing & Heating Company Limited, Highview Plumbing & Heating Ltd., 663482 Ontario Limited, 648956 Ontario Limited and (Respondents) (*Dismissed*)

0037-96-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Toronto Dominion Bank, Pen Equity Management Limited, Westeinde Flemming Development Limited, Westeinde Construction Limited, Penex Kanata Limited (Respondents) (*Withdrawn*)

1485-96-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Betteridge Constructions Inc. Betteridge Construction (Timmins) Ltd. Betteridge Smith Construction Co. Ltd. (Respondent) (*Granted*)

1588-96-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Highview Plumbing & Heating Ltd. and Inter Wide Mechanical & Contracting Ltd. (Respondents) (*Dismissed*)

1688-96-R: United Steelworkers of America (Applicant) v. Mining Technologies International Inc. (Respondent) (*Dismissed*)

1764-96-R: Local 280 of the Int'l Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' Int'l Union (Applicant) v. Mintz & Partners Limited, Court appointed Receiver & Managers of 576099 Ontario Inc., Hotel Selby Inc. (Respondents) (*Withdrawn*)

2989-96-R: Jean-Guy Sabourin, Pierre Courville, Serge Newton, Denis Brazeau, Jean Marie Turpin, Roch Lemay, Pat O'Neil, Damien Labelle, Denis Lacourse, Denis Chretien, Denis Girouard, Mario Morissette, Michel Hotte, Steve Comtois, Robert Laberge and Brian Banks (Applicant) v. New Mandor Food Storage Inc., 1172305 Ontario Inc., West Pack Limited, Capital Beef Corporation and (Respondents) v. Teamsters Local Union 91 (Intervener) (*Withdrawn*)

3621-96-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Galmar Electrical Contracting Inc., Sanimar Electric Limited, Noranda Electrical Contractors Limited and Marmet Electrical Contracting Inc. (Respondents) (*Granted*)

4193-96-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. L. Pupolin Plumbing & Heating Limited, Associated Mechanical Trades Incorporated, Luciano Pupolin, Ed Pupolin (Respondents) (*Withdrawn*)

0037-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Canadian Concrete Forming Limited and Canada-Wide Waterproofing Supplies and Installation Ltd. (Respondents) (*Granted*)

0349-97-R: International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. 418058 Ontario Limited c.o.b. as TJ Steel, Deranne Steel Fabricators Ltd., Joe Francesconi, Silvano Francesconi (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

0234-97-R: Communication, Energy and Paperworkers Union of Canada (Applicant) v. The Toronto Board of Education (Respondent) (*Granted*)

SECTION 64.2 SUCCESSOR RIGHTS/CONTRACT SERVICES

2286-95-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Hilton Canada Inc. and Sizzling in Toronto, Inc. (respondents) (*dismissed*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3791-95-R: Marriott Corporation of Canada Ltd. (at Carleton University) (Applicant) v. Canadian Union of Public Employees and its Local 2451 (Respondent) (*Granted*)

3930-96-R: Employees of Keanall Industries Desormeaux, Robert; Mangroo, Davindra; Ramsammy, Daniel; Mahoney, Edward; Mason, Brenda (Applicants) v. United Food & Commercial Workers International Union, Local 351 (Respondent) v. Keanall Industries Inc. (Intervener)

Unit: "all employees of Keanall Industries Inc. at 6450 Vipond Road in the City of Mississauga, save and except supervisors, persons above the rank of supervisors, office, clerical and sales staff and students employed during the school vacation period" (5 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

0136-97-R: Paul Irwin (Applicant) v. Communications, Energy and Paperworkers Union of Canada and its Local 333-23 (Respondent) v. G.V.S. Wood Products (intervener)

Unit: "all employees of G.V.S. Wood Products, a division of 268682 Ontario Limited, in the Village of Elmvale, save and except supervisors, and persons above the rank of supervisors, office, clerical, sales staff, co-op students, and students working during the school vacation period, and employees in bargaining units for which any trade union bargains rights as of November 22, 1993" (5 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked against respondent	7

0163-97-R: Emmanuel Bumanglag, Beryl Dymond, Paul Dymond, Connie Mitchell & Maria Silva (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. M. Kimel Realty (Intervener)

Unit: "employees of M. Kimel Realty engaged in cleaning and maintenance at 484 & 494 Avenue Road in the Municipality of Metropolitan Toronto, including Resident Superintendents, Assistant Superintendents, doorpersons, maintenance employees, general handymen and persons employed for not more than 24 hours per week, save and except Property Managers and persons above the rank of Property Manager" (5 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked against respondent	5

0191-97-R: (Hamilton Bingo Country) Dabber Bingo Holdings Inc. and/or 587141 Ontario Limited Hamilton, Ontario Employees (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Respondent) v. Dabber Bingo Holdings Inc. and 587141 Ontario Limited (Intervener)

Unit: “all employees of Dabber Bingo Holdings Inc. and/or 587141 Ontario Limited in the Regional Municipality of Hamilton-Wentworth, save and except Session Manager, Canteen Manager, and persons above the rank of Session Manager and/or Canteen Manager” (26 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	19

0217-97-R: Richard Yakeley (Applicant) v. Teamsters, Local Union 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Respondent) v. Miller Concrete, a Division of Miller Paving Limited (Intervener)

Unit: “all batchers who are not also performing supervisory duties, drivers, warehousemen and yardmen, employed at or working out of the Ready Mix Plant at; and all garage and maintenance employees associated with the Ready Mix Plant at Aurora, Ontario” (17 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of ballots marked against respondent	16

0281-97-R: Rowena Borenstein, Rachel Conway, Andrew Currier, Lucille D'Souza, Michael Hilliard, Franco Rossetto, Julie Shin, Max Starnino, Carl Turner and Eric Wredenhagen (Applicant) v. Canadian Union of Public Employees, Local 1281 (Respondent) v. Gowling, Strathy & Henderson (Intervener)

Unit: “all articling students employed by the Employer [the intervenor] under Articles of Clerkship in the Municipality of Metropolitan Toronto” (16 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	6

0343-97-R: Jeffrey Robertson (Applicant) v. Amalgamated Transit Union, Local 616 (Respondent) v. Complete Auto Network of Canada Ltd. (Intervener) (*Withdrawn*)

0361-97-R: Amin Amhed (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. The Sheeting Edge Co. Ltd. (Intervener)

Unit: “all employees of The Sheeting Edge Co. Ltd. working at 820 Gana Court in the City of Mississauga, save and except supervisory personnel, persons above the rank of supervisory personnel, office and sales staff, and students employed during the summer vacation period” (25 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	22

0374-97-R: Union Employees of Smith Sign Co. (Applicant) v. Sign & Pictorial Painters Local 1630 (Respondent) (*Dismissed*)

0391-97-R: Patrick Robinson (Applicant) v. The United Food and Commercial Workers International Union, Local 175 & 633 (Respondent) v. 241 Pizza Ltd. (Intervener)

Unit: "all order processing and customer service employees of 241 Pizza Ltd. at 2000 Weston Rd., Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, marketing and quality control staff, computer maintenance staff, janitorial staff, security staff and communications staff" (13 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5

0406-97-R: Dennis R. Quinn and Employees of K.S. Centoco Ltd. (Applicant) v. K.S. Centoco Ltd. (Respondent) (*Dismissed*)

0469-97-R: Wayne R. Knights (Applicant) v. International Union of Plant Guard Workers of America Local 1956 (Respondent) (*Dismissed*)

0470-97-R: Kemar Door Employees (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local 1030 (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2247-96-U: Laundry and Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. The Hospital for Sick Children (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3167-94-U: Antonio Peluso (Applicant) v. United Steelworkers of America, Local 7277, District 6E (Respondent) v. Russel Drummond Division of Fedmet Inc. (Intervener) (*Withdrawn*)

4654-94-U: Mrs. Jody Reitsma-Leadson et al. (Applicant) v. The Board of Education for the City of Hamilton, The Ontario Secondary School Teachers' Federation (Respondents) (*Dismissed*)

0402-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Davis Martindale and Company Inc., Coopers & Lybrand Limited, Canadian Imperial Bank of Commerce, North American Trust Company, Allstate Insurance Company of Canada, Charles R. McDonald, William Pascoe, Clifford N. Sutts, Aric J. Rusk and BDO Dunwoody Limited (Respondents) (*Dismissed*)

0551-95-U: Victoria Shymlosky et al. (Applicant) v. The Board of Education for the City of Hamilton, The Ontario Secondary School Teachers' Federation (Respondents) (*Dismissed*)

0646-95-U: Jody Reitsma-Leadson et al. (Applicant) v. The Board of Education for the City of Hamilton, The Ontario Secondary School Teachers' Federation (Respondents) (*Dismissed*)

0902-95-U: Lorraine Grace, et al (Applicant) v. The Ontario Nurses' Association (Respondent) v. Laurentian Hospital (Intervener) (*Terminated*)

2895-95-U: Rene Hamilton (Applicant) v. Ontario Hydro Construction and Teamsters Local Union 230 (Respondents) (*Withdrawn*)

3066-95-U: Bakery, Confectionery and Tobacco Workers' International Union, Local 264 (Applicant) v. Sir Bagel Company Ltd. (Respondent) (*Withdrawn*)

0044-96-U; 0112-96-U: The Civic Institute of Professional Personnel (Applicant) v. The Regional Municipality of Ottawa-Carleton (Respondent); Ottawa-Carleton Public Employees Union, Local 503 (Applicant) v. The Regional Municipality of Ottawa-Carleton (Respondent) (*Withdrawn*)

0574-96-U: Mr. Danny McLean (Applicant) v. The Ontario Public Servants Employees Union, Local 248 (Respondent) v. Hamilton-Wentworth Detention Centre (Intervener) (*Dismissed*)

0769-96-U: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario (as represented by the Ministry of Finance) (Respondent) (*Endorsed Settlement*)

0849-96-U: Labourers' International Union of North America, Local 1036 (Applicant) v. The Corporation of the City of Sault Ste Marie, Steve Butland, Joseph M. Fratesi, Charles Swift, Jack Moore, Udo Rauk, Jack Cameletti, John Solski, Mary Borowicz, Michael Sanzosti, Rick Niro, Walter Chisholm, Wayne Deluca, Ed Szczepanik and Gary Trembinski (Respondents) (*Withdrawn*)

1270-96-U: Syndicat canadien de la fonction publique et sa section locale 2519 (Applicant) v. Corporation le Lycée Claudel (Respondent) (*Withdrawn*)

1291-96-U: Joseph Giordano (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) Local 27 (Respondent) v. General Motors of Canada Limited (Intervener) (*Withdrawn*)

1644-96-U: Brewery, General and Professional Workers Union (Applicant) v. Med-Chem Laboratories Ltd., Medical Sciences Laboratories of Newmarket, Ltd., Med-Chem Health Care Services Inc. and Rosemary Eckert (Respondents) (*Withdrawn*)

2155-96-U: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses - Durham Region Branch (Respondent) (*Withdrawn*)

2239-96-U: Don Brunelle, Randy Donaldson, Ken Vandelinder, Floyd Taylor, Frank Schwartz, Greg Fevreau (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-CANADA) and its Local 444 (Respondent) v. Chrysler Canada Ltd. (Intervener) (*Dismissed*)

2260-96-U: Teamsters Local Union No. 419 (Applicant) v. SWO Distribution Centres Limited c.o.b. Surelink, Tibbett & Britten Group Canada Inc., The Oshawa Group Limited and Ontario Produce Company (Respondents) (*Withdrawn*)

2261-96-U: Edward Jenko (Applicant) v. United Steelworkers of America Local 2859, and Babcock & Wilcox Industries Ltd. (Respondents) (*Dismissed*)

2401-96-U: Public Service Alliance of Canada (Applicant) v. Metcalfe Realty Company Limited (Respondent) (*Withdrawn*)

2614-96-U: Teamsters Local Union No. 879 (Applicant) v. Hamilton Bio Conversion Inc. and Thermo Tech Technologies Inc. (Respondents) (*Withdrawn*)

2615-96-U: Teamsters Local Union No. 419 (Applicant) v. Brampton Bio Conversion Inc. (Respondent) (*Withdrawn*)

2995-96-U: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 700 (Applicant) v. International Brotherhood of Electrical Workers, Local 530 and Christopher Electric Ltd. (Respondents) (*Withdrawn*)

3063-96-U: Patti Cross (Applicant) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (I.A.T.S.E.), Local 173 (Respondent) (*Withdrawn*)

3191-96-U: Ontario Public Service Employees' Union (O.P.S.E.U.) Local 341 (Applicant) v. Ministry of Solicitor General and Correctional Services, Millbrook Correctional Centre (Respondent) (*Withdrawn*)

3335-96-U: Roger Werchehora (Applicant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Dismissed*)

3336-96-U: United Food and Commercial Workers International Union (Applicant) v. Hercules Moulded Products Inc. (Respondent) (*Withdrawn*)

3394-96-U: United Food and Commercial Workers International Union, Locals 175 & 633 (Applicant) v. Banlake Associates Limited c.o.b. as Bancroft I.G.A. and The Oshawa Group Limited (Respondents) (*Withdrawn*)

3527-96-U: Rocco Tassone (Applicant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Dismissed*)

3834-96-U: David M. Peever (Member Local 1703 Amalgamated Transit Union) (Applicant) v. Amalgamated Transit Union, Local 1703 (Respondent) v. McDonnell-Ronald Limousine Service Limited (c.o.b. as Airline Limousine) (Intervener) (*Dismissed*)

4001-96-U: William Loupos (Applicant) v. Custodial & Maintenance Association (C.A.M.A.) and The Waterloo County Board of Education (Respondents) (*Withdrawn*)

4009-96-U: Labourers' International Union of North America, Local 183 (Applicant) v. Kimble Construction Ltd. (Respondent) (*Withdrawn*)

4012-96-U: Brad Taylor and Linen Drivers of Work Wear Corporation Ltd. (commonly known as G & K Work Wear) in Ontario (save and except Ottawa) (Applicant) v. Work Wear Corporation of Canada, Ltd. (a subsidiary of G & K Services Inc. G & K Work Wear) (Respondent) (*Withdrawn*)

4059-96-U: Ontario Public Service Employees Union and its Local 345 (Applicant) v. Peterborough Civic Hospital and St. Joseph's Hospital and Health Centre Peterborough Hospital Shared Services (Respondents) (*Withdrawn*)

4083-96-U: Jeanne Monette-Koutny (Applicant) v. Chrysler Canada, Bramalea Assembly Plant (Respondent) (*Withdrawn*)

4133-96-U: Nestor Koukoulidis (Applicant) v. United Association of Plumbers & Steamfitters (Local 46) (Respondent) (*Withdrawn*)

4136-96-U: T. W. Hall (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

4278-96-U: Irene Thompson (Applicant) v. London and District Service Workers Union Local 220 (Respondent) (*Withdrawn*)

4313-96-U: Guido Capone, Barbara Hobbs, Clayton MacLean, and Ryszard Kagan (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.-Canada) Local #1459 and National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.-Canada) and Chrysler Canada Limited (Respondents) (*Withdrawn*)

4317-96-U: International Union United Automobile, Aerospace and Agricultural Implement Workers of America UAW Local 251 (Applicant) v. Cascade Precision Machining division of AmCan Casting Ltd. (Respondent) (*Withdrawn*)

4327-96-U: Fay Simpson (Applicant) v. Service Employees International Union, Local 204, Toronto East General and Orthopaedic Hospital Inc. (Respondents) (*Withdrawn*)

4358-96-U: Hormuz Rahana (Applicant) v. U.F.C.W. Local 114P (Respondent) (*Dismissed*)

0005-97-U: Angela Byfield (Applicant) v. Service Employees International Union, Local 220 (Respondent) v. The Grand River Hospital Corporation (Intervener) (*Dismissed*)

0015-97-U: David Gazit (Applicant) v. Ontario Public Service Employees Union (Respondent) v. George Brown College (Intervener) (*Dismissed*)

0031-97-U: Hotel, Restaurant and Hospitality Service and Employees Union, Local 442 (Applicant) v. Hampton Inn (Respondent) (*Withdrawn*)

0044-97-U: Denis G. Gauvreau (Applicant) v. CAW Local 195 (Respondent) (*Withdrawn*)

0073-97-U: Gary Thibeault (Applicant) v. Colonial Building Restoration, Livio Balanzin (Respondents) (*Dismissed*)

0143-97-U: Renato Viotto (Applicant) v. Algoma Steel - Local Union 2251 - W.C.B. (Respondent) (*Withdrawn*)

0160-97-U: Ontario Nurses' Association (Applicant) v. Saint Elizabeth Health Care (Durham Region) (Respondent) (*Withdrawn*)

0164-97-U: Caroline Scheuermann (Applicant) v. The Service Employee Union, Local 210 (Hotel Dieu Hospital Unit) (Respondent) (*Withdrawn*)

0168-97-U; 0252-97-U: Teamsters Local Union 938 (Applicant) v. Maxxim Medical Canada Ltd. (Respondent) (*Withdrawn*)

0189-97-U: Woodlands Store Fixtures (Applicant) v. Jaysukh C. Mistry (Respondent) (*Dismissed*)

0239-97-U: Steve West (Applicant) v. Gen Auto Shippers, Teamsters Local 938 (Respondents) (*Dismissed*)

0250-97-U: United Steelworkers of America (Applicant) v. Canadian Liquid Air Ltd. (Respondent) (*Withdrawn*)

0255-97-U: Joseph C. McNeil (Applicant) v. U.W.O. Food Services and Terence Drakes (Respondent) (*Dismissed*)

0283-97-U: Jean Braithwaite (Applicant) v. Wackenhut of Canada (Respondent) (*Dismissed*)

0289-97-U: Brewery, General and Professional Workers' Union (Applicant) v. T & S Blowmoulding Inc. (Respondent) (*Withdrawn*)

0339-97-U: James Hastings (Applicant) v. Craftwell Containers (Respondent) (*Dismissed*)

0356-97-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Sentinel Plumbing Inc. (Respondent) (*Withdrawn*)

0396-97-U: Randy Lee Charette (Applicant) v. CUPE Local 3440 (Respondent) (*Dismissed*)

0438-97-U: Dianne Averill (Applicant) v. London and District Service Workers Union, Local 220 (Respondent) (*Dismissed*)

0473-97-U: Clive Hutchinson (Applicant) v. International Association of Machinists and Aerospace Workers Lodge 2323 (Respondent) (*Withdrawn*)

0509-97-U: Brad Taylor and Linen Drivers of Work Wear Corporation Ltd. (commonly known as G & K Work Wear) in Ontario (save and except Ottawa) (Applicant) v. Work Wear Corporation of Canada, Ltd. (a subsidiary of G & K Services Inc. (G & K Work Wear) (Respondent) (*Dismissed*)

0580-97-U: Barbara Porter (Applicant) v. United Security Guards Union (UPGWA) (Respondent) (*Dismissed*)

0657-97-U: Pamela M. Urquhart (Applicant) v. Sunnybrook Health Science Centre, Human Resources Dept. (Respondent) (*Dismissed*)

0662-97-U: Viktor Tsimakouridze (Applicant) v. Mayfair On The Green (Respondent) (*Dismissed*)

0672-97-U: Shayne Hoffman (Applicant) v. The Credit Valley Hospital, Radiography Department, Technical Directors, Don Old, Lynn Clark (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

0247-97-M: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America and Local 1588 The Ontario Taxi Union (Applicant) v. Metro Cab Company Limited and Metro Cab Associates' Committee Representing Associates of Metro Cab Company Limited (Respondents) (*Granted*)

0249-97-M: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America and Local 1688 The Ontario Taxi Union (Applicant) v. Diamond Taxicab Association (Toronto) Limited, and The Diamond Taxicab Associates' Committee Representing Associates of Diamond Taxicab Association (Toronto) Limited (Respondents) (*Endorsed Settlement*)

0397-97-M: Canadian Union of Public Employees (Applicant) v. Metro Toronto Civic Employees' Union Local 43 (Respondent) v. Darius Masalas, Harro Bauer, Woodrow A. Higgins, Danny Scheibli, Brian Morgan, Thomas Lenathen and Earl Gordon (Intervenors) (*Granted*)

APPLICATIONS FOR CONSENT TO PROSECUTE

3393-96-U: United Food and Commercial Workers International Union, Locals 175 & 633 (Applicant) v. Banlake Associates Limited c.o.b. as Bancroft I.G.A. and The Oshawa Group Limited (Respondents) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

1787-96-M: John Albert De Boer (Applicant) v. The Canadian Union of Public Employees and its Local 87, and The Corporation of the City of Thunder Bay (Respondents) (*Withdrawn*)

3945-96-M: Albert Waterhouse (Applicant) v. Sheet Metal Worker's International Association Local 47 and Almonte Fire Trucks Ltd. (Respondents) (*Withdrawn*)

0340-97-M: Larry Carrocci (Applicant) v. United Food and Commercial Workers Union Local 617P, Port Colborne Poultry Ltd. (Respondents) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0351-97-M: Columbia MBF (Employer) v. Laundry and Linen Drivers and Industrial Workers Union Local 847 (Trade Union) (*Granted*)

TRUSTEESHIP

0649-96-T: Canadian Union of Public Employees (Applicant) v. Metro Toronto Civic Employees' Union, Local 43 (Respondent) v. Darius Masalas, Harro Bauer, Woodrow A. Higgins, Danny Scheibli, Brian Morgan, Tommy Lenathen, and Earl Gordon (Intervenors) (*Granted*)

0235-97-T: Canadian Union of Public Employees (Applicant) v. Canadian Union of Public Employees Local 2151 (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

1450-96-JD: Doug Chalmers Construction Limited (“Chalmers”) (Applicant) v. Labourers’ International Union of North America, Local 1089 (“Labourers”) and United Brotherhood of Carpenters and Joiners of America, Local Union 1256 (“Carpenters”) (Respondents) v. Teamsters Local 880 and International Union of Operating Engineers, Local 793 (Interveners) (*Granted*)

2629-96-JD: Ontario Public Service Employees Union (Applicant) v. Metro Toronto Housing Authority, Canadian Union of Public Employees (Respondents) (*Granted*)

2658-96-JD: Labourers’ International Union of North America, Ontario Provincial District Council (Applicant) v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736, Canon Inc., and Accurate Railroad Construction Ltd. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1745-95-M: Hospitality & Service Trades Union Local 261 (Applicant) v. Princess Street Development (Kingston) Inc. (Respondent) (*Dismissed*)

1350-96-M: Wilfrid Laurier University Staff Association (Applicant) v. Wilfrid Laurier University (Respondent) (*Granted*)

0181-97-M: Service Employees Union, Local 183 (Applicant) v. Quinte Vocational Support Services (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3645-93-OH: Philip Klygo, Andrew Kirkland (Applicants) v. Pioneer Youth Services (Toronto) Inc. (Respondent) (*Dismissed*)

3166-94-OH: Antonio Peluso (Applicant) v. Russelsteel (formerly Bridge Steel) (Respondent) (*Withdrawn*)

1687-96-OH: Selwyn Pieters (Applicant) v. Toronto Board of Education (Respondent) v. Canadian Union of Public Employees, Local 134 (Intervener) (*Withdrawn*)

1881-96-OH: Selwyn Pieters (Applicant) v. Toronto Board of Education (Plant Operations) (Respondent) (*Dismissed*)

1937-96-OH: Carolyn M. Davis (Applicant) v. Thomas Allen & Son Ltd. and Larry White (Respondent) (*Dismissed*)

2253-96-OH: Labourers’ International Union of North America, Local 183 on its own behalf and behalf of The Bricklayers Masons Independent Union of Canada, Local 1 and The Masonry Council of Unions Toronto and Vicinity (Applicant) v. Renato Gottardo, Gottardo Contracting (1980) Inc. (Respondent) (*Withdrawn*)

3238-96-OH: Gerald Mark Osborne (Applicant) v. Atotech Canada (Respondent) (*Withdrawn*)

4155-96-OH: Trevor Flint (Applicant) v. CSP Foods, Frank Quartarone, Don Kosak and Pam Kubis (Respondent) (*Withdrawn*)

0026-97-OH: Norman Dilworth (Applicant) v. Tytrek Limited (Respondent) (*Withdrawn*)

0146-97-OH: Mr. Chris Phene (Applicant) v. Applied Wiring Assemblies Inc. (Respondent) (*Withdrawn*)

0195-97-OH: James Bepperling (Applicant) v. Williams Operating Corporation (Respondent) (*Withdrawn*)

0384-97-OH: Benjamin Vaughan (Applicant) v. Joy Selmes (Respondent) (*Dismissed*)

COLLEGES COLLECTIVE BARGAINING ACT

2423-96-U: Ontario Public Service Employees Union (“the Union”) (Applicant) v. Council of Regents for the Colleges of Applied Arts and Technology (“the Council”) (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

1878-95-G: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Downsview Plumbing & Heating Company Limited, Highview Plumbing & Heating Ltd., 648956 Ontario Limited and 663482 Ontario Limited (Respondents) (*Dismissed*)

0019-96-G; 3843-96-G: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Global Mechanical Ltd., Intercontinental Plumbing and Fire Protection Co. Ltd., Dynamic Power Excavating Ltd., IPJ Investments Ltd. (Respondents); The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67 (Applicant) v. Global Mechanical Inc., Intercontinental Plumbing and Fire Protection Co. Ltd., Dynamic Power Excavating Ltd. (Respondents) (*Endorsed Settlement*)

0036-96-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Toronto Dominion Bank, Pen Equity Management Limited, Westeinde Flemming Development Limited, Westeinde Construction Limited, Penex Kanata Limited (Respondents) (*Withdrawn*)

0977-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Victory Plumbing Inc. (Respondent) (*Endorsed Settlement*)

1231-96-G: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Betteridge Construction Ltd. (Respondent) (*Granted*)

1625-96-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cornwall Gravel Company Limited (Respondent) (*Endorsed Settlement*)

2503-96-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Strong Forming Inc. (Respondent) (*Granted*)

3085-96-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. REAB Floor Installation Inc. (Respondent) (*Granted*)

3135-96-G: International Union of Bricklayers and Allied Craftworkers, Local #2, Ontario (Applicant) v. ACDMC Group Incorporated and Springbank Masons Ltd. (Respondents) (*Granted*)

3782-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Heritage Mechanical Ltd. (Respondent) (*Withdrawn*)

3976-96-G; 3977-96-G: The United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Losereit Limited (Respondent) (*Granted*)

4031-96-G: Labourers’ International Union of North America - Local 247 (Applicant) v. Ellis-Don Construction Ltd. (Respondent) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Intervener) (*Withdrawn*)

4143-96-G; 4144-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. University Plumbing & Heating Ltd. (Respondent) (*Granted*)

0036-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Canadian Concrete Forming Limited and Canada-Wide Waterproofing Supplies and Installation Ltd. (Respondents) (*Granted*)

0076-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 759 (Applicant) v. E.S. Fox Limited (Respondent) (*Withdrawn*)

0166-97-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 221 (Applicant) v. Calorific Construction Limited (Respondent) (*Endorsed Settlement*)

0209-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. H.L.O. Iron & Manufacturing Co. Ltd. (Respondent) (*Granted*)

0210-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Adam Clark Company Ltd. (Respondent) (*Withdrawn*)

0223-97-G; 0236-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Country Drywall Inc. (Respondent) (*Withdrawn*)

0227-97-G: International Brotherhood of Electrical Workers Local 353 (Applicant) v. Langley Utilities Contracting Ltd. (Respondent) (*Withdrawn*)

0231-97-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Independent High Voltage Limited (Respondent) (*Withdrawn*)

0233-97-G: International Brotherhood of Electrical Workers Local 353 (Applicant) v. Douglas Roberts Electric (Respondent) (*Withdrawn*)

0243-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Cobra Drain & Development Corporation (Respondent) (*Granted*)

0251-97-G: International Union of Bricklayers & Allied Craftworkers, Local 6 (Windsor) (Applicant) v. C & C Construction Corp. (Respondent) (*Granted*)

0280-97-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Q-Tech Limited 663925 Ontario Inc. (Respondent) (*Granted*)

0285-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Mainway Industrial Installations Inc. (Respondent) (*Granted*)

0310-97-G: International Brotherhood of Painters & Allied Trades, Glaziers Local 1819 (Applicant) v. Top Glass & Mirror Inc. (Respondent) (*Withdrawn*)

0338-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bel Air Excavating Limited (Respondent) (*Granted*)

0379-97-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Richmer Electric Ltd. (Respondent) (*Granted*)

0383-97-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Corporation of The City of Toronto (Respondent) (*Withdrawn*)

0398-97-G; 3284-96-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Blandford Industrial Insulations & Blandford Sheet Metal (Divisions of 975575 Ontario Ltd.) (Respondent) (*Withdrawn*)

0399-97-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Coolbreeze Air Conditioning and Heating (A Division of B.A. Della Penna Industries Inc.) (Respondent) (*Granted*)

0400-97-G; 0461-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. John Bianchi Grading Ltd. (Respondent) (*Endorsed Settlement*)

0427-97-G: The United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. 704189 Ontario Limited o/a Phoenix Restoration (Respondent) (*Granted*)

0475-97-G: Labourers' International Union of North America, Local 837 (Applicant) v. Acura Forming Ltd. (Respondent) (*Granted*)

0477-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Elmford Construction Company Limited (Respondent) (*Granted*)

0478-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Elmroad Construction Co. Limited (Respondent) (*Granted*)

0480-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Aspen Concrete & Drain Inc. (Respondent) (*Granted*)

0481-97-G: Labourers' International Union of North America, Local 247 (Applicant) v. Peter Kiewit Sons Co. Ltd. (Respondent) (*Withdrawn*)

0482-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Mariofino Contracting Inc. (Respondent) (*Granted*)

0536-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Elmford Construction Company Co. Ltd. (Respondent) (*Endorsed Settlement*)

0538-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. F.R. Paving Co. Ltd. (Respondent) (*Granted*)

0549-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Armbro Materials & Construction Ltd. (Respondent) (*Withdrawn*)

0576-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. 991877 Ontario Limited o/a OBN Roadbuilders (Respondent) (*Withdrawn*)

0598-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Wilson & Somerville Limited (Respondent) (*Granted*)

REFERRAL FROM MINISTER (SEC. 3(2)) HLDA

3495-96-M: Meadowcroft Management Group (Briargate Retirement Living Centre) (Applicant) v. Service Employees Union, Local 183 (Respondent) (*Endorsed Settlement*)

4213-96-M: Canadian Union of Public Employees, Local 2862 (Applicant) v. Ottawa Valley Autistic Homes (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1458-93-R: International Brotherhood of Electrical Workers Local 586 (Applicant) v. Conego Construction Ltd. (Respondent) (*Denied*)

4625-94-R: Ontario Public Service Employees Union (Applicant) v. St. Mary's of the Lake Hospital (Respondent) v. Kingston General Hospital, Association of Allied Health Professionals: Ontario, The Religious Hospitallers of Saint Joseph of the Hotel Dieu of Kingston (Hotel Dieu Hospital), Employees' Association, St. Mary's of the Lake Hospital, Canadian Union of Public Employees and its Local 1974 (Interveners) (*Withdrawn*)

0165-95-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Kennedy Electric Limited (Respondent) v. The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario (the "ETBA") and The Electrical Contractors Association of Toronto (the "ECAT") (Interveners) (*Granted*)

3308-96-U: Mrs. Susan Bauer (Applicant) v. York University (Respondent) (*Denied*)

4322-96-U: Raffick Aliry (Applicant) v. United Steelworkers of America Local 9236 and Walbar Canada Inc., Plant 1 (Respondents) (*Dismissed*)

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ISSN 0383-4778





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